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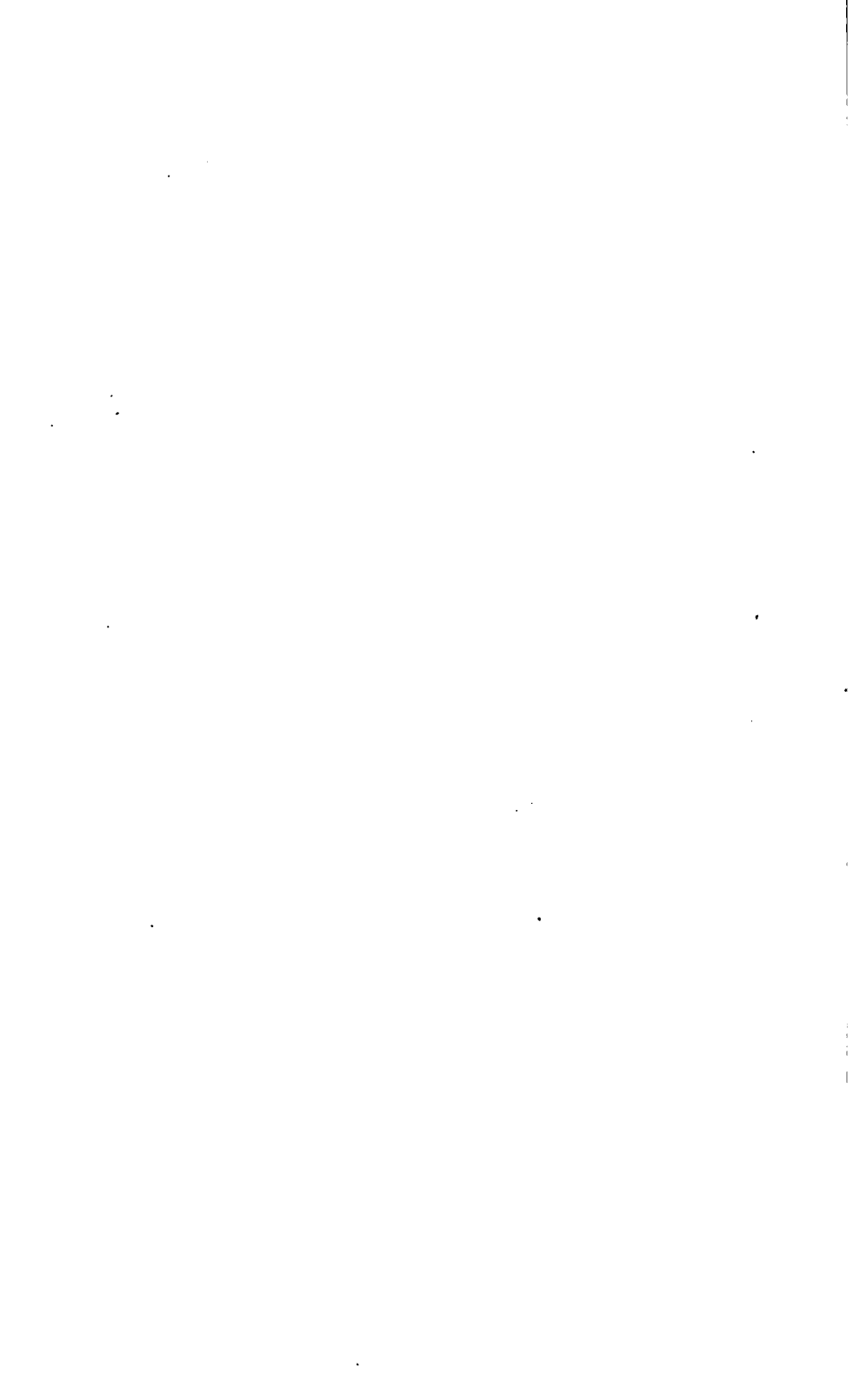
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G. Minge, Stirling.

THE

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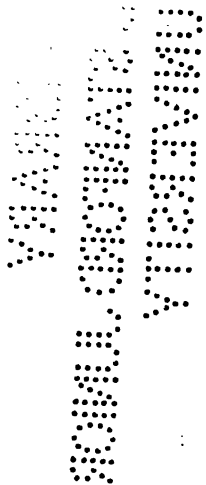
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THE JOURNAL OF JURISPRUDENCE.

THE SCIENCE AND ART OF JURISPRUDENCE.

THE use of the term "science" in popular language is extremely loose. Nor is this laxity confined to the vulgar, for several writers of eminence seem in their works to ignore the distinction between Science and Art. For example, we have a well-known book on surgery, entitled "The Science and Art of Surgery, being a Treatise on Surgical Injuries, Diseases, and Operations."¹ And yet in the preface, Surgery is stated to be a "department of the healing art." There is no doubt the preface is right, and the title-page is wrong. Surgery is an *art* which derives assistance from anatomy, physiology, pathology, chemistry, and other *sciences*.

As if to show how desperate is the confusion, the "Imperial Dictionary"² tells us that "The *theory* of music is a *science*; the *practice* of it is an *art*." Now, what is commonly called the "theory of music" relates to the *art* of composition, the rules of harmony, counterpoint, fugue, etc. A person may be a splendid performer on an instrument, that is, he may be perfect in that branch of the *art*, and yet he may know very little about the *theory*—the resolution of discords, progression of harmonies, and so forth. But the art is not confined to this branch. The making of musical instruments and the writing of music are all branches of the art. It is as much an *art* to write a fugue correctly as it is to draw a tree correctly. The *science* of music goes beyond this. It asks the cause of the pleasure we derive from harmony and melody. It explains the physical cause of harmonies, discords, and such phenomena: and finally merges into æsthetics and metaphysics.³

These illustrations will perhaps enable the reader to understand

¹ "Science and Art of Surgery," by John E. Erichsen (4th ed.).

² "Imperial Dictionary," *sub voce* "Science."

³ The *science* of music is treated in such works as Professor Helmholtz's "*Théorie Physique de la Musique*" (Paris, 1868); and in works on acoustics, such as Professor Tyndall's "Lectures on Sound."

the correct distinction between an art and a science, and to sum up their differences we cannot do better than quote the words of Dr. Whewell. He says,¹ "The object of Science is *Knowledge*; the object of Art are *Works*. The latter is satisfied with producing its material results; to the former the operations of matter, whether natural or artificial, are interesting only so far as they can be embraced by intelligible principles. The end of Art is the beginning of Science; for when it has seen *what* is done, then comes the question *why* it is done. Art may have fixed general rules stated in words, but she has these merely as means to an end: to Science the propositions which she obtains are each, in itself, a sufficient end of the effort by which it is acquired." He then proceeds to explain that art in its progress becomes continually more complicated, whereas science is continually striving after greater simplicity. Or, as Herbert Spencer puts it,² "Science concerns itself with the co-existences and sequences among phenomena, grouping these at first into generalizations of a simple or low order, and rising gradually to higher and more extended generalizations."

Very great confusion has been caused among speculative writers on the subject of Law by their neglect of this distinction between Jurisprudence as a science and Jurisprudence as an art. It will be found, on examination, that this distinction goes a great way to reconcile the apparent antagonism between the English view of the subject, as presented by Bentham and Austin, and the views which are commonly held in Germany, and which are represented in this country by Professor Lorimer of Edinburgh.³

The distinction is just that laid down by Dr. Whewell. Law as an art aims at the *practical* object of improving men in their social relations. When this is done Law as an art is satisfied. But then there are further questions which arise. Why is one law better than another? What is the ultimate nature of Law? Whence does Law arise? It is the *science* which deals with such questions, and when it has got the knowledge which it seeks it is satisfied. It is true that the science assists the art, but that is not the object of the science. The science arises from human inquisitiveness. It is the same spirit of inquiry which makes men search the rocks and caves in the bowels of the earth, and classify insects in obscure islands in the Pacific Ocean. But Jurisprudence, together with Theology, Psychology, Ethics, Politics, and the medical sciences, have a nearer relation to man himself, and so his interest in them is greater.

Each of these last named sciences has a special series of phenomena,

¹ "*Novum Organum Renovatum*" (3rd ed., p. 131).

² "*First Principles*" (3rd ed., p. 131).

³ Dr. Hutchison Stirling, a few years ago delivered to the Juridical Society, Edinburgh, a course of lectures on the science of law, from the Hegelian point of view, which were published in this Journal in the volume for 1872 (vol. xvi.). The Professor of Ethics in Glasgow closes his ordinary course of lectures with an outline of the science of jurisprudence from a similar point of view.

which it investigates. Has Jurisprudence any such phenomena which it investigates? Or, to put the question in another form, Is there any *real* connection between a physical law, such as gravitation, and a human positive law, such as a law forbidding theft? We purpose to devote the remainder of this article to an examination of this question, and to show that our answer must be in the affirmative.

The Duke of Argyll in his "Reign of Law," in a chapter entitled "Law in Politics,"¹ discusses this subject. He seems, however, to regard the laws of man's nature as *imposed* upon him *from without*; whereas, as we shall endeavour to show, these laws *constitute* man's nature, and so far from being imposed upon him, if they were taken away, man, as such, would cease to exist.²

Our question may be put in this form,—Is the term "law," as applied to the properties of matter, and the relations of plants and animals, a pure metaphor and nothing more? This question has received very various answers. Montesquieu, impliedly at least, answers it in the negative when he says,³ "All beings have their laws. Deity has His laws; the material world has its laws; intelligences superior to man have their laws; the lower animals have their laws; man has his laws." And a little further on in the same chapter he explains that the lower animals and plants follow their laws better than man, because, though he is an intelligent and conscious being, he is subject to error as a finite intelligence. On the other hand, Austin criticizes the above quotation, and answers the question thus: "Of the laws which govern the conduct of intelligent and rational creatures, some are laws imperative and proper, and others are closely analogous to laws of that description. But the so-called laws which govern the material world, with the so-called laws which govern the lower animals, are merely laws by a metaphor."⁴

The earliest conception of a law of nature in the physical universe is something laid down and superimposed on, or at least external to matter. We find this idea expressed in the opening lines of Halley's verses prefixed to Newton's *Principia*:

"En tibi norma poli, et divæ libramina molis,
Computus en Jovis: et quas, dum primordia rerum
Pangeret, onniparens leges violare creator
Noluit."

Until recently physicists looked upon matter as an entity which they knew, and attached to which there were certain laws. The notion was that the Creator had *given* to matter certain properties

¹ Chap. vii. p. 354.

² See "Reign of Law," pp. 434, 435. See also "Schwegler's History of Philosophy," by Stirling (4th ed.), p. 332 *et seq.*; Ahrens' "*Cours de Droit Naturel*" (7th ed.) Tom. I. p. 174.

³ "*De L'Esprit des Loix*," Livre I., chap. i.

⁴ Austin's "Jurisprudence" Vol. I. p. 163. See also "Whately's Logic"—"Ambiguous Terms," *sub voce* "Law."

—weight, density, inertia, and so forth. But a moment's reflection shows us that all we know about matter is simply a collection of properties or laws. If we attempt to define matter, we should simply enumerate its properties. If we abstract its properties from matter it ceases to exist. Matter without inertia or density, and infinitely compressible, is not matter. If we met with such a thing in the course of physical investigations, we should invent another name for it, and place it in a different class. When we speak of matter then, we simply use a compendious expression for inertia, gravitation, incompressibility, and such other phenomena. In prosecuting our inquiries into the nature of matter we may find that properties which we thought different are in reality examples of a greater and more comprehensive law. For example, the same law makes a stone fall to the bottom of a pool and a log of wood rise to the surface. The tendency, then, of modern science is to wider generalization. But it will be observed that if we knew what matter was in its ultimate essence we could deduce from it, as in pure mathematics, the whole of the so-called properties of matter. Meanwhile we must proceed inductively, and go back from the multifarious forms of matter with which we are surrounded, and form a unity out of them. The properties or laws of matter therefore inhere in the substance of matter. They are matter itself.

Passing to the vegetable world, we find there are certain uniform phenomena which are characteristic of plants. If we attempt to define a plant we should differentiate it from pure matter by an enumeration of those phenomena which constitute vegetable life. These uniform phenomena constitute all our knowledge of the vegetable world. They are the laws which the botanist or the vegetable physiologist seeks; and it is on the uniformity of these phenomena or laws that the possibility of the *arts* of agriculture, arboriculture, and floriculture depends.

Again, in the animal kingdom we find the same. The different species of animals follow their own instincts; and if they appear to disobey them, it is only in appearance, because it will be found on further inquiry that they are only following another and a stronger instinct. But these instincts are inherent in the natures of the animals. Justinian in his *Institutes* gives expression to the other view, to which we referred above, when he says,¹ "*Jus naturale est quod natura omnia animalia docuit.*" This sentence implies the existence of animals, and the *subsequent* imparting to them of laws for their guidance; but no naturalist at the present day would lay down such a proposition. All animals which at present exist possess certain qualities. These are the "laws" of their natures—the *jus naturale*, so far as they are concerned. "A lion is a carnivorous animal." This statement conveys information as to the teeth, claws, and structure of the animal, and as to its food. If an animal of this kind were to eat vegetables it would not be a lion.

¹ Inst. "*Præm. de Jur. Nat.*" (1, 2).

The "law," therefore, of and for lions is to eat flesh. If a lion did anything else it would violate its essential character. It would not only incur, in all probability, physical death, but it would also die, so to speak, a moral death. Such an event is, however, out of the question, because none of the lower animals is capable of violating such a law. From this example it is apparent that we are putting the matter in a false light when we say that the Creator has *laid down* laws for the lower animals: the mere fact of creation *implied* the laws. If we analyze our notion of an animal we would simply add to our idea of matter the idea of animal life. This, again, is only a collection of properties or phenomena of a higher and more complex nature than those of vegetables, or the chemical properties of matter.

And when we distinguish animals from one another we distinguish them by their properties or characteristics, as when we speak of sword-fish, lump-suckers, or soles. Each of these names *denotes* a particular fish, but *connotes* only one characteristic; and if we try to be more particular in our specification we should simply go on adding phenomena to our description. Here, therefore, again, our knowledge is simply phenomenal.

Has Man laws in this sense? No one will dispute that his body, simply as matter, is subject to all the "laws" of matter. In other words, his body *is* matter. But in addition to the physical properties of matter Man's body has the properties of animal life. As an animal, therefore, he has all the properties of an animal. All his organism works independently of his will, and exhibits uniform phenomena. But Man is more than an animal. How do we distinguish him from them? We may define him as a social animal (*ζῷον πολιτικόν*), as an articulate speaking animal (*μέρον ἄνθρωπος*), as a rational animal. But each of these differences, or the whole of them together, point merely to characteristics of man, — properties or phenomena of man, as such. It is these properties or phenomena which constitute *man*. Without them he would only be a tailless baboon. In Man, as in the other cases mentioned above, our knowledge is simply relative; we know only properties, and nothing more. As we rise from matter to chemical action the phenomena become more complex; so when we rise from chemical action to vegetable life; so, again, as we rise to animal life; and, lastly, as we rise to man, the phenomena become more complicated and obscure, and seem to baffle the inquirer, so that man appears to be almost a bundle of inconsistencies.

The physician studies the different parts of the human body, and investigates the particular functions of each organ and ascertains its "laws." Thence arise the sciences of anatomy and physiology. He further investigates the effects and qualities of certain substances in connection with the animal economy. When the results of those sciences are used in practice, we have the *art* of

medicine. In all his investigations the physician *assumes* the immutability of the *laws of nature*, that is, of the properties and characteristics of the human body and the substances with which he deals. If he did not do so the Science of Medicine would be an idle and useless amusement, and the Art an impossibility.

But the jurist, the legislator, and the judge assume as much the immutability and the persistence of certain human "laws" as does the physician. If he did not do so, or if there were no such "laws," jurisprudence as an art would be impossible, and positive laws, if made at all, would only be made to be broken. The laws or properties of Man which the jurist assumes are those inherent in man's moral nature as a social being—as a member of society. If there were no society positive laws would be useless, or rather there could be no positive law. But then it must be borne in mind that man as a solitary animal would not be Man. Such an animal would constitute a new species, and would exhibit qualities and characteristics different from those now shown by Man. It is the province of the science of ethics to discover those essential laws of Man (1) in relation to himself; (2) in relation to other men; (3) in relation to Deity. The *science* of jurisprudence, which is simply a branch of ethics, sets itself to discover the laws of man (1) in his relation to individual men; (2) in relation to the State; and (3) in the relations of corporations and States *inter se*. The philosophical jurist investigates and discovers the general principles which the practical jurist, whether judge, legislator, or practising lawyer, simply assumes.

What, then, is a positive law? It may almost without metaphor be described as a part of the social "machinery." Just as an engineer takes advantage of the rigidity of certain metals, and their different co-efficients of friction, and the expansibility and elasticity of the vapour of water, and constructs an engine; so a legislator, taking advantage, consciously or unconsciously, of the "laws" or fundamental qualities and characteristics of Man's nature, lays down a positive law. For example, Mr. Plimsoll's Act¹ ordained that: "Every person who sends, or attempts to send, or is party to sending or attempting to send a British ship to sea in such unseaworthy state that the life of any person is likely to be thereby endangered, shall be guilty of a misdemeanour," etc., etc. Here we have a perfect law, according to Austin, with superior and inferior persons, a general rule, and a sanction. This rule is founded on the fact that right-minded shipowners do *not* send ships to sea in this state, and that right-thinking men would *not* endanger the lives of seamen. In other words, it is a particular example of the precept, "Thou shalt love thy neighbour as thyself." It is also founded on the law of selfishness. The sanction appeals to the person and property of the defaulter. But the very existence of this law implies that the persons infringing it are in a minority.

¹ 39 & 40 Vict. cap. 80, sec. 4.

If British commerce depended for its prosperity on persons such as those against whom this act is directed, it would cease to exist. Such an act can only deal with a few exceptional cases. It aims only at raising a few delinquent shipowners to the moral rank of their fellows, and protecting seamen to some extent against them.

The late Act against the Colorado beetle¹ was an example of the same principles. It might have been expected that the prospect of famine and dear provisions would have prevented any one from importing such a pest; but it seems there are men so insane or so inhumanly wicked that they would wilfully ruin a nation's agriculture and bring misery on millions of their fellow-creatures. For such are those laws devised. They are unhealthy, diseased men. Positive law points out the disease; the sanction prescribes a remedy.

Our conception of positive law is that of a contrivance designed to facilitate human intercourse and contribute to man's freedom and perfection. A steam-engine is founded on, and is so constructed as to exemplify, the laws of nature in matter. So positive laws are founded on and exemplify the laws of nature in man as a social being. We should therefore define a positive law as a "Rule of life, founded on a law or laws of Man's nature, as a social being, and consciously or unconsciously deduced therefrom or adopted by the community to which it applies." We say, "consciously or unconsciously," because first efforts at legislation are rude devices almost spontaneously evolved by some great emergency; and, besides, the great bulk of our laws were unconsciously formed by custom. They may be enacted by a popular body, in consequence of a popular vote, as when we recently disestablished the Irish Church; or they may be rules formed by a superior power, and which the subjects adopt and approve as suited to the circumstances of the case. They might not have been able of themselves to discover them so soon or to express them so well, but when they are enacted and pointed out to them they appreciate their value and adopt them. Such laws, however, must not be beyond the comprehension of the people to whom they are to apply, and they must be suited to their state of civilization.

We cannot help observing how strained is Austin's definition of positive law. The essentials of a positive law, according to him, are (1) that it should prescribe a general rule of conduct; (2) that it should be a command by a superior to an inferior; (3) that it should be fortified by a sanction. A positive law, as commonly understood, necessarily implies none of these. (1) It is shown by Maine² that the earliest form of criminal trial among the Romans was by a legislative assembly, where the law was laid down by the people *after* the offence was committed. Mr. Austin has no doubt been misled by the fact that English law has difficulty in overtaking criminals who are ingenious enough to invent new crimes, and may be unable to punish

¹ 40 & 41 Vict. cap. 68.

² "Ancient Law," chap. x. p. 372 (4th ed.).

them without the assistance of an Act of Parliament. But in Scotland, if some one were to invent some new crime, the common law is sufficiently elastic to reach it, and the Court would have little difficulty in finding the libel relevant "*at common law*." (2) Austin feels a difficulty in determining the superior who lays down some laws. The sea laws of the Middle Ages are a standing confutation of his position. No superior power invented "crossed cheques," and when Parliament legislated about them it simply adopted and regulated a custom of bankers and mercantile men. The mysteries of feudal conveyancing were certainly beyond the ingenuity of any tyrant or "superior;" and do we not sometimes read of the Court consulting conveyancers as to their practice? The bye-laws of corporations and clubs and societies, the articles of association of companies, and contracts of copartnery are all examples of positive laws which do not fall under Austin's definition "*Uti lingua nuncupassit, ita jus esto*." (3) It is matter of history that when a nation becomes very corrupt laws become useless. Sanctions are worthless at such a time. A week's experience among the criminal population would convince the most sceptical that if our laws depended on their sanctions for their observance they would not be very successful. A little experience of the sanction seems to whet the appetite of the criminal for more. But it is a straining of language to say that all positive laws have a sanction. The rules of conveyancing have none, the laws of contracts have none; and it would rather seem that in England, if the law was violated, the delinquent got the benefit of equity. What sanction is attached to the laws of process or the laws of evidence? If they have a sanction it contributes little to their observance.

Professor Lorimer's conception of positive law is that it is the law natural in special circumstances, and with reference "to special relations."¹ To this idea there are the following objections: (1), It does not recognize the fact that the laws of nature are always positive in form, while very many positive laws are negative. The Professor says (p. 6), "Apart from their realization in positive laws, the rules of natural law are merely hypothetical and contingent, depending for their concrete forms on the answer which may be given by observation and experience to questions of fact, which they do not profess to solve." Surely the fundamental laws of human nature are not "hypothetical and contingent." Can they not be as clearly stated, and are they not as fixed and certain as Kepler's laws? Professor Lorimer himself at a later stage² lays down laws revealed to us by nature—that man has a right to exist, and a duty to respect the existence of others. The laws of human nature can be ascertained and formulated as well as those of the material universe. (2) This idea does not acknowledge the fact that a positive law may be an application of more than one natural law. (3) It does not make provision for a sanction, which frequently accom-

¹ "Institutes," pp. 6, 341.

² P. 160, *et seq.*

panies human positive laws. A sanction is not necessary to make a law, but at the same time it has been almost always a part of the *machinery* adopted in legislative enactments. (4) It does not sufficiently recognize the necessarily *arbitrary* element in positive human laws. This objection is partly met by the explanation that positive laws are always and necessarily imperfect.¹ We may know the natural law which we wish fulfilled, and also the conditions in which it is realized, and, besides, have the perfect will to realize it; but yet we must have some blemish in our positive law, because it must be expressed in words. We cannot have form without matter. The coarseness of the matter mars the form. When we speak of an arbitrary element in law, we refer to rules of evidence, rules of process, and such like, where hard and fast lines are drawn merely for convenience; and another set of rules might have been *as* suitable, and *not more so*, at the same time and place and in the same circumstances, and which other set of rules would have exemplified the laws of nature as well as the first. Professor Lorimer's definition of positive law is rather that of law as it cannot be—a sort of limit to which human laws tend, but which they never reach. What we wish in jurisprudence is a definition of positive law as it *is*. With all deference to such high authorities as Austin and Professor Lorimer, we venture to submit that the definition suggested above is more comprehensive than that of the former, and more strictly accurate than that of the latter.

To sum up the result of our discussion. We have seen that there are necessary laws not only of Man's body as a piece of matter and an animal system, but also of his higher spiritual nature, which constitutes him Man. These laws are all literally and accurately described as *physical*, whether they belong to the higher or lower *φύσις*. The various arts and manufactures bring these laws into subjection for his material comfort. The art of medicine attends to his animal nature. Positive law deals with his higher spiritual nature in its social relations. It takes advantage of a series of *physical* laws and adapts them to man's use, just as is done in medicine, engineering, or any other practical art.

Positive law is used to express the collection of the whole rules of positive law,—as, in fact, equivalent to the sum of positive laws. We thus speak of "the law of entail," or "the law of bills," meaning the sum of the rules or laws applicable to entailed estates or bills of exchange. In like manner "natural law" is used to express the sum of the natural laws, which are characteristic of man. And as "positive law" is loosely used to denote the *art* of jurisprudence, so "natural law" is used to denote the *science*, and accordingly Ahrens defines natural law as "*la science, qui expose les premiers principes du droit, conçus par la raison et fondés dans la nature de l'homme; considérée en elle-même, et dans ses rapports avec l'ordre universel des choses.*"²

¹ P. 341.² Vol. I. sec. 1.

Professor Lorimer takes exception to this position and says that the science and the objects with which it deals should not be confounded. But this objection is surely hypercritical. The use of the term natural law as applied both to the science and the objects with which it deals is an example of the transmutation of a concrete into an abstract term. The words "science," "disease," "music," are all examples of the same, and other examples will readily occur to the reader.

In our next article we shall endeavour to point out the importance of the distinction between the Science and Art of Jurisprudence, in enabling us to appreciate the different works of writers who have treated the subject of abstract Jurisprudence.

EQUITY IN ENTAILS.

THE recent important decision of the First Division of the Court in the case of *The Earl of Breadalbane v. Jamieson* (March 16, 1877, 14 Sc. L. R. p. 420), appears, in our humble judgment, to establish the proposition that an heir of entail in possession may lawfully destroy the mansion-house of the entailed estate, provided he takes care to die within a certain short space thereafter. This is, no doubt, a startling deduction, and it is therefore necessary to state in detail the grounds on which it proceeds. The facts of the case were extremely simple. The late Marquis of Breadalbane pulled down Armaddy Castle, which, notwithstanding the existence of Taymouth Castle, the Court, on the authority of the *Marquis of Ailsa* (Jan. 21, 1853, 15 D. 308), held to be one of the mansion-houses of the entailed estate or estates. He, however, clearly intended to rebuild it. He had fixed upon plans and specifications, and entered into contracts with tradespeople, and, in fact, at the date of his death, although the old house had disappeared, a new *uninhabitable* structure had taken its place, the erection of which probably cost as much as the old house was worth, and the completion of which, as an inhabitable house, would still cost a very large sum. The trustees or executors of the deceased heir gave the contractors an allowance, resold them the unused materials, and then retired from the scene, leaving the Argyleshire Breadalbane estates without a mansion-house. In these circumstances the Earl of Breadalbane, the next heir in possession, sued the trustees of his predecessor for declarator that they were bound to complete the new house, or to build a mansion-house suitable to the estate, and not inferior to the old one, or to restore the old fabric to its original condition; and that the building materials were heritable and part of the entailed estate. There were also money decrees asked for, but apparently it was not stated what would be done with the money, the estates

having been disentailed before the date of action. It was held by the First Division, dissenting Lord Deas, that no action lay at the instance of the succeeding heir. The Lord President states, with his usual clearness and force, the two points on which he rested the judgment of the Court: a principle and a fact which do not seem to fit into each other very well. The principle was this, that for an act of contravention of entail you have no remedy except that provided by the deed of entail, viz., a declarator of contravention and irritancy: the fact was, that there was no contravention at all. However eminent the judge, it certainly exposes a judgment to some suspicion when you find in the beginning of it a principle carefully stated, explained, and supported by argument and authority, which, as you proceed, is discovered and admitted to be entirely inapplicable to the facts of the case. The Lord President, indeed, observes: "Surely if the next heir succeeding cannot have a claim of reparation against the executors of the party who committed the act of contravention, still less can he have any claim against the executors of an heir who committed no act of contravention." Here the judicial reasoning evidently proceeds on an ambiguity of the word "claim." This may mean either a claim founded on an act of contravention (which could not be the present claim, there being *ex hypothesi* no contravention), or a claim not founded on an act of contravention (which the present claim necessarily must have been for the same reason). Returning to the principle on which the decision is said to rest—viz., "that the only remedy for a contravention is a declarator of contravention and irritancy"—we may observe, in the first place, that it is not clearly or satisfactorily established by the authorities which the Lord President cites. No doubt, if you take Lord Eldon's speech in the *Queensberry* case in connection with the circumstances of that case, it would seem to decide the point in very general terms. In the *Queensberry* case leases had been granted below the true value by an heir who had omitted to record the entail, and an action for reparation was brought by a succeeding heir for the difference between the true and the false value. The House of Lords was very much puzzled by the notion of succeeding heirs bringing separate actions on the same cause until the expiry of the lease; and although, on a remit, the Court of Session explained that the judgment on value in the first action brought would necessarily bind the succeeding heirs, their ultimate decision was undoubtedly governed by this chimerical difficulty. Lord Eldon attempted no reasoning in answer to the reconsidered opinion of the Scotch Judges, but he says one opinion or the other must be adopted; and by way of explaining his adoption of the opinion of the minority of Scotch Judges, he refers to his speech, delivered about the same time, in the *Ascog* case. That speech was a vigorous and conclusive piece of judicial reasoning in support of the proposition that, where an entail did not effectually prohibit sales, the heir

selling was not bound to go through the farce of reinvesting the price in terms of the entail. Whether that proposition agrees with the entailor's intention or not may well be doubted, but there can be no doubt that it agrees with the then settled principles of entail law, which are perhaps not yet unsettled. The principle of the *Ascog* case, therefore, is this, that the entailor *expressed* in his deed all the *conditions* on which the lands were to be held, and re-investment on sale was not one of these. He prohibited certain things, and annexed certain penalties to violation of the prohibition: viz., that the next heir was to get possession by declarator. It is not at all a question of *remedy* for a wrong committed either at common law or against the good faith of a deed. So far as the deed is concerned, the heirs of entail are strangers, and it is possible that they have no rights and liabilities at common law. But, in the *Ascog* case, it is a question of the *rights* given by the deed to substitute heirs upon an act of contravention. The substitute may dispossess the contravener and step into the enjoyment of the estate; if he does not do so, *sibi imputet*. He has no other right; he has suffered no other wrong; because by the entailor's deed, as interpreted (or misinterpreted) by the Court, the heir in possession was truly permitted to sell; he was truly permitted to contravene subject only to the risk of being dispossessed. From this decision, the common sense of which we do not desire to discuss, but which, as we mentioned before, is said to contain the *rationale* of the *Queensberry* case, it would be a rather startling inference that under no deed of entail whatever are there any implied equities between heirs of entail. The *Ascog* case proceeds on the most malignant—or, as it has been called, a fiendish—construction of the entailor's intention, but it none the less authorizes us to argue from the entailor's intention in cases not identical in circumstances with itself. The time has gone by when it was thought that to do the greatest possible amount of violence to an entailor's obvious intention was the proper rule for construing an entail. If then, in any particular case, we start with the expression of intention, which is implied in a distinct prohibition, and if the language of the deed does not compel us to think (as Lord Eldon very artificially thought in the *Ascog* case) that the entailor meant to exclude every form of remedy except the particular form mentioned in the deed, and if the rights of heirs taking under a deed depend on the lawful intentions of the maker therein expressed, why should we decline to recognize a plea of equitable compensation in the case of an entail which would be recognized without hesitation in the case of a settlement not under strict entail? We cannot therefore subscribe to the Lord President's doctrine that for an act of contravention the only remedy is the declarator provided by the entail. Wherever such a declarator is not the appropriate remedy, certainly where it is not a possible remedy, the law will give another. The Lord President's doctrine is in

fact contradicted by his own judgment, in which he explains that a substitute heir may interdict a threatened act of contravention. But whence comes this remedy of interdict? From the common law outside the deed. It is no reply to this argument to say that interdict is preventive, while the deed provides for redress against completed acts of contravention. What is this but saying that the deed has omitted to provide all the remedies competent to a substitute heir? The averment of legal right which would support an application for interdict would also support an application for compensation. But let us assume that the Lord President is right in holding that for an act of contravention the only remedy is that provided by the deed. How is this doctrine to be applied to the circumstances of the *Breadalbane* case, where admittedly there was no contravention, either threatened or completed, by the Marquis; where, therefore, neither interdict nor declarator could be employed? Had either of these proceedings been raised, the Marquis would have answered: "I am in the course of improving, not destroying, the mansion-house;" and if there had been no lapse of time or other circumstances throwing discredit on the *bona fides* of the heir in possession, this answer must necessarily have been allowed by the Court to be sufficient. In a doubtful case they would probably direct the heir in possession to give some guarantee that the work of reconstruction should be carried through. But while in the technical sense there is during the life of the heir no act of contravention inferring irritancy and forfeiture against him, precisely because he intends to perform the obligation to restore which the deed imposes upon him: as soon as the heir dies, and thus becomes personally unable to perform that obligation, and his representative refuses to complete the intention of the deceased heir, there is then undeniably constituted a contravention of the entail, because by the act of an heir in possession the mansion-house has been destroyed. As a matter of course it would, in these circumstances, be useless and absurd to raise a declarator of contravention, but it would be a perversion of all sound construction to say that because a declarator of contravention cannot be raised, there is no wrong done, and no right which can be asserted by a succeeding heir. Heirs of entail are not excluded from participation in the ordinary rules of justice; and it can hardly be suggested that when the entailer prohibits the destruction of the estate he contemplates the representative of an heir who has destroyed it, saying, "My author intended to restore this, but he didn't." If this judgment is to stand as final in Scotch Entail Law, it is clear that heirs of entail who have made their testamentary arrangements *intuitu mortis* may now safely gratify whatever inclination they have to pull down the mansion-house. Practically the decision will cover a case of deliberate fraud, for how is it to be proved that the heir in possession has no intention to rebuild?

ON THE TITLE TO SUE.

LAST year we contributed to the *Journal of Jurisprudence* an article upon the subject of the Title to Sue, in which we dealt with some of the general principles relating to it. In the present paper we propose very shortly to conclude by a reference to some of the cases in which the pursuer was not a single private individual ; as, for example, actions at the instance of, or with the concurrence of, the Crown, of corporations, or even private partnerships. Taking first actions in which Crown intervention is necessary, the varied class of criminal and quasi-criminal proceedings at once suggest themselves. With the Criminal Courts, and the necessity for either the actual appearance of the Crown officials, or at least evidence of their consent having been obtained, we have not here to do. There are a class of cases, of which the by no means rare breach of interdict is an example, which partake both of the civil and the criminal in their nature, requiring the concurrence of the Crown as represented by their officers. What are the rights of private prosecutors in Scotland, and their power to compel Crown sanction, are questions of no small interest constitutionally, and were discussed but recently in the case of *Macintosh* (H. C., Nov. 4, 1873 ; 2 Couper 367).

It is in those cases in which punishment of the offender is sought, as well as restitution against civil wrong, that the concurrence of the public prosecutor may be found necessary. In the case of *Anderson v. Spence*, May 27, 1830, 8 Shaw 820, the question whether it were competent to conclude for a fine without that concurrence was raised, but not decided.

The peculiarity in cases of breach of interdict lies in the fact that the offence there alleged to have been committed is one of contempt of Court, and it does seem rather strange that the consent of the criminal officer should be necessary before the Civil Court can vindicate its own majesty. There seems no doubt that the Civil Court could at once, on the spot, and in a summary manner, direct the punishment, by fine or otherwise, of any who had openly insulted its dignity, and that without obtaining the permission of any Crown officials. In the case of the *Duke of Northumberland v. Harris* (Feb. 23, 1832, 10 Shaw 366) a petition for redress against breach of interdict and highly aggravated contempt of Court was presented. Crown counsel declined to give concurrence, and the Court seem to have been at first of opinion that as the question was one of contempt of Court such concurrence was unnecessary. The prayer craved their Lordships to "inflict such punishment, by imprisonment, fine, or otherwise as may be considered necessary." But this the Court came at last to hold it was impossible to do without the concurrence of the Lord Advocate. And in the later case of *Usher v. The Magistrates of Edinburgh* (March 7, 1839, 1 D. 639) a similar petition was refused upon the same ground ; while in

that of *Mackenzie v. Thomson* (March 4, 1843, 5 D. 771) a petition was rejected, which bore to be with the concurrence of the Lord Advocate, because it appeared that it had never really been obtained, the Court remarking that "in considering how far concurrence was necessary the case could not be viewed as if the party had come forward originally without alleging that he had obtained it."

Such concurrence was at one time necessary in actions of reduction-improbation. As Erskine explains (IV. i. 19), "Because the writings called for are libelled to be false, his Majesty's advocate, who is the public prosecutor of crimes, must concur in the action." He adds, however, "But as this is a mere point of form, he may, notwithstanding his concurrence, appear as counsel for the defender if the writings be not challenged upon grounds of proper falsehood," that is, of course, if there be no ground to suspect forgery. By the 17th section of the recent Court of Session Act it is provided that such concurrence in this class of actions shall be no longer necessary. As a process of ranking and sale came to imply an action of reduction-improbation, the approval of the Lord Advocate was also necessary for it, but this has been altered by the section of the Act above referred to. By the 43rd section of 15 & 16 Vict. c. 83, the concurrence of the Lord Advocate, which he is "empowered to give upon just cause shown only," is rendered necessary in actions of reductions of letters patent. This provision does not appear to be affected by the Court of Session Act. It gave rise to a curious discussion in the case of *Gillespie v. Young* (July 20, 1861, 23 D. 1337). In that case, which was an action for the reduction of letters patent, the summons contained a docquet signed by the Lord Advocate's first clerk, in which he granted concurrence for the Advocate. The defenders maintained that this was not sufficient, as there was no evidence of concurrence, or at least of just cause for concurrence. On the other hand, it was contended that neither the pursuer nor the Court could call in question the grounds upon which the Advocate had gone in giving the consent, and as that consent had been given in the customary way the defenders could not object to it. It was proved upon inquiry that the form of concurrence was the usual one in cases which called for it, and that the Lord Advocate had given no special concurrence, nor was any cause shown to him. The Court were quite clear upon the point of their inability to inquire into the nature of the cause shown, or whether indeed any were shown at all. But they were of opinion that a concurrence obtained *pro forma* in this manner was not what the Act contemplated, and they therefore refused to sustain the action as one of reduction. But it is obvious from the remarks made in giving judgment that a mere formal concurrence is all that is necessary in the ordinary case, as in a petition for breach of interdict.

It would appear that where a private party abandons an action

which he is suing with the concurrence of the public prosecutor, the latter cannot insist in it for the purpose of recovering the fine. It is different, however, when decree for the fine has been pronounced, as a discharge of any private claim for damages will not cut out the public authorities from the benefit of the fine which has been imposed. (Compare cases of *Procurator-Fiscal of Edinburgh v Mann*, Feb. 24, 1805, Hume 504, and *Procurator-Fiscal of Edinburgh v Phillips*, Feb. 24, 1820, Hume 504.)

There are certain actions carried on at the instance of the Crown which may be characterized as private. But the Crown may have a title to sue, even where it is not possible to show that Crown rights are affected. It may do so in the interests of the public, as was decided in the case of the *Officers of State v. Smith* (March 11, 1846, 8 D. 711), where Crown interference rescued the well-known Portobello sands from the encroachments of a feu.

Coming now to actions at the instance of more than one person, we take up the case of companies and incorporations. The principles governing such cases have now been settled, and are also regulated by statute. A company unincorporate cannot sue by its company name if descriptive merely. A company incorporate can. Joint-stock companies registered sue under their registered name. A brief but clear sketch of the law upon this subject will be found in Sheriff Clark's work upon Partnership.

A society or company unincorporated must sue in the names of at least a number of its constituents. The manager alone is not sufficient (*Robertson v. Anderson*, June 4, 1841, 3 D. 986). An action at the instance of the "General Assembly of the General Baptist Churches," and three individuals being a committee of the members, was sustained in the case of *Evans and Others* (June 17, 1841, 3 D. 1030). Three seems to have been recognized as the proper minimum number in the case of the *London Shipping Co. v. M'Corkle* (June 19, 1841, 3 D. 1045). That action was raised in name of the company and one individual, described as agent and partner. The instance was held insufficient. Lord Medwyn observed, "There is a principle of law why three are better than one—that *tres faciunt collegium*. The principle of law is, that every partner should appear in the action." Lord Moncrieff seemed to place the distinction in the fact that one person cannot constitute a partnership. The Court were quite clear that one person could not be admitted as pursuer. In theory any member of the concern should appear, but in practice this could not always be possible. Thus, in the case of the Baptists above referred to it would not have been easy to have found out, and further, to have obtained, the concurrence of the members of some seventy congregations. Hence a representative number has come to be accepted—not always however. As an illustration of this, the case of *May v. Matthews* (Jan. 24, 1833, 11 Shaw 305) is instructive. It was an action of damages for injury done to an association consisting of seventy-five mem-

bers, and was raised by parties designing themselves "fourteen of the individual members of the joint-stock company or association." The opinion of Lord Balgray, acquiesced in by the other judges, was to the effect that "in any question when the cause of action arising out of a partnership concerns all the partners, they must *ante omnia* be in the field either as pursuers or defenders." It is not easy to reconcile this case with decisions either prior or subsequent to it in date. The defence taken was, that "if the pursuers intended to conclude for the whole damage sustained by the association, the summons was incompetent, inasmuch as the pursuers had no title to represent the other members, or to uplift and discharge the sum concluded for." Where it was provided by the deed bequeathing it, that the receipt of the treasurer or secretary of an unincorporated society should be a valid discharge for a legacy, it was held that a claim for the legacy might be sustained at the instance of the treasurer or secretary alone. (*Sommervail v. Edinburgh Bible Society*, Jan. 22, 1830, 8 Sh. 370.)

A corporation cannot in its corporate capacity raise an action relating to matters affecting the interests not of the corporation as such, but of the individual members only. The Corporation of Fleshers of Dumfries raised an action of damages against a magistrate in that town, who had complained that the town had been swindled out of their rents or dues from the fleshmarket. The Lord Ordinary refused to sustain the action, "in respect that defamatory expressions libelled, if made use of by the defender, must have been directed not against the incorporation of butchers of Dumfries as a corporate body, but against individuals belonging to that incorporation. (Case of *Rankine*, Dec. 10, 1816, 19 F. C. 224.)

That a company can maintain an action of damages for slander was admitted in the case of the *North of Scotland Banking Coy. v. Duncan* (June 25, 1857, 19 D. 881) even by Lord Deas, who formed the minority in that case. It was an action brought at the instance of the Bank against an individual, who was alleged to have calumniated the Committee of Management. Lord Deas remarked, "I do not say a company or corporation may not be slandered so as to entitle the company or corporate body to demand reparation. If it be blazoned abroad that a bank be insolvent or bankrupt, or equivalent expressions used, as in the English case of *Foster*, or that the whole policy of a life assurance company is to elude their obligations by taking advantage of captious and unfair objections to void their policies, as in the English case of *Williams*, it may very well be that the bank or insurance company can respectively sue for damages." The question then came to be whether an accusation against the Managing Committee was tantamount to one against the Bank. Lord Deas held it was not, and that the Bank could only make their action relevant by libelling an intent to injure the corporation through slandering its committee. The other judges held differently. Lord Ivory said, "The Committee is a

form of words for representing the body whose officers they are, and therefore I do not read the phrase as meaning the individual members of the Committee, but the Committee in its official capacity, which is, in other words, the bank itself."

A number of other cases might be cited upon this subject; we have singled out those only which fall under a general principle.

ON TWO RECENT CASES UNDER THE EDUCATION (SCOTLAND) ACT, 1872.

SINCE the completion last month of the series of articles in this journal upon schoolmasters under the Education Act, two decisions have been pronounced in the Outer House, both bearing somewhat upon the subject discussed in those articles, and throwing additional light upon the position of matters now by law established.

The first of these cases was decided on 29th November 1877, by Lord Adam, in the Outer House; and against this judgment a reclaiming note has been presented. The action was one raised by Donald McLean and others, residents in the island of Easdale, forming a part of the county of Argyll, against the School Board of the united parishes of Kilbrandon and Kilchattan. From the statements made it would appear that Easdale contains about 476 inhabitants, and is separated by a narrow, though at times stormy, arm of the sea from the adjacent island of Seil, the population whereof numbers 280. Seil is connected by a bridge with the mainland. The main source of livelihood in both islands is working slate quarries. It appears that prior to 1872—for upwards, at all events, of forty years—a school for the education of the children was maintained on Easdale, the number of children between five and thirteen years of age being at the present time about ninety-five. The committee of the Free Church, who had charge of this school on the island of Easdale, soon after the Education Act became law, handed it over to the School Board. The Board, after considering the matter, resolved to have a school on Seil, about a mile and a half from Easdale village, but only a class-room for the accommodation of children under eight years of age, and no school on Easdale itself. The pursuer and others, who were residents on Easdale, were dissatisfied with this arrangement, which they asserted had been carried out by two members of the School Board for the benefit of their own children. A petition to the sole proprietor, Lord Breadalbane, asking him to give them a school-house, was refused. Meanwhile the School Board had submitted to the Board of Education their resolution as to the provision of school accommodation, in accordance with the statutory provisions to that effect (section 27), and the people at both ends of the parish became dissatisfied, and petitioned the Board. Accordingly the Board wrote

again to the Board of Education, and, availing themselves of the statutory machinery provided by section 29, requested a visit from one of the members of the Central Board, "to advise as to the distribution of the schools of the parish." Mr. Ramsay accordingly went, and heard the views of all concerned. Thereafter, following out the recommendations of Mr. Ramsay, the Board passed another resolution, still giving only a class-room to Easdale, and this resolution was confirmed by the Education Board. The Easdale people now, through their agents, appealed to the Central Board, who, on writing to the School Board for any remarks, obtained an answer that they were quite ready to carry out whatever changes or additions to the accommodation the Board of Education might deem necessary, and in what they had done were only executing their orders. They were, however, they said, quite satisfied that the provision made was "quite convenient and available, as well as ample in amount." Further, the School Board thought the accounts of the tempestuous ferry much exaggerated, the crossing being a free one, and, with rare exceptions, safe! They had also, they said, made arrangements specially for the children's being taken across at the proper hours, and at the narrowest part of the sound, where, indeed, the distance was only a trifle over forty yards. At length the Board of Education, on 24th February 1877, refused finally to make any recall of, or alteration upon, the sanction they had given to the proposed school buildings. The pursuers then brought this action into Court, basing the case, it may be generally said, upon (1) failure to supply Easdale with proper school accommodation as required by the Act; (2) unfair and unreasonable exercise of the discretion entrusted to the School Board; (3) failure duly to report to the Education Board the full state of the facts. The pursuers accordingly sought to have it declared that the School Board must provide suitable school accommodation for the Easdale children, or, alternatively, must inquire into the best mode of doing so, and report the whole matter to the Central Board. The School Board denied the competency of the action. As stated, it was, they maintained, irrelevant, and moreover, they had carried out the directions of the superior Board as to accommodation, and made, in the course of perfectly regular and legal procedure, arrangements sufficient to meet the educational requirements of the district under their charge. Lord Adam disposed of the case by pronouncing the action incompetent, and assoilzieing the School Board. We may briefly summarize his opinion, as expressed in the note appended to the interlocutor. After giving an account of the facts of the case, his Lordship observes that the pursuers in particular complained that the School Board had wilfully concealed from the Board of Education the following alleged facts:—(1) The extreme danger in crossing such a tempestuous arm of the sea as Easdale Ferry in winter, and even often in summer; (2) the danger to the health of the children from exposure in crossing in an open boat in all

weathers, and in waiting for the boat without shelter at the ferry; and (3) the breadth of the sea and the insufficiency of the crew of the boat, one man only being provided, while safety required two at least." The Lord Ordinary says he thinks the relative positions of the islands must have been under Mr. Ramsay's notice when he made his official visit; but at any rate, it is added, the case was represented to the Board of Education, who found no reason to change their views, and this after having fully applied their minds to the matter, and taken reasonable means to satisfy themselves of the correctness of their opinion. "The Board of Education are made by the Act the sole and exclusive judges in this matter, and consequently the Court of Session has no jurisdiction to review their determination."

The pursuers have reclaimed against this judgment, and the question will therefore further be discussed; but whatever may be the result, it scarcely seems very probable that any ultimate success can accrue to them. Even supposing the Court intervened, and so far gave effect to their wishes as to require the School Board to make further inquiry and again report to the Board of Education, we must remember that the latter body have already, by the report of one of their own members sent expressly to Easdale, obtained information upon what must be matters of fact rather than of opinion. Those who object had then, and have since had, a full opportunity of stating all their views, and it scarcely would seem likely that anything new could be ascertained about the question at issue between the parties by the proposed inquiry and report. So far as it has gone, however, the pursuers have been put out of Court on the statutory ground that no such matter can be raised save before the statutory tribunal who have already disposed of it, and whose decision is subject to no review.

The necessity for great care on the part of the Education Board is well illustrated by cases such as the preceding one. The opportunity of saving a considerable burden to the ratepayers might be too often a strong temptation to a local Board, and lead to the discontinuance of schools where they were really wanted, or to the endeavour to centralize in each district. The Act no doubt provides certain distances beyond which children cannot be forced to attend schools, but of course a school-house may be planted in such a position in a parish as to be within what we may call legal access of all the inhabitants, and yet at the same time so as to be positively injurious to the educational advancement of the population. It is not for us, however, to attempt to draw any conclusions from the facts which have emerged as to this distant and semi-insular parish in the Western Highlands; but it is not difficult to see what grave hardships the existence of a ferry as at Easdale, or of deep bays as in other places, may cause, especially when the people, from the nature of their employment, happen to be gathered somewhat closely together on the more remote and perhaps most barren portion of the district.

We may next turn to the other case, even more recent than this Easdale one, for the judgment of the Lord Ordinary is of so late a date as December 6th. Already Mr. Marshall, the teacher of Saltcoats Public School, had been in litigation with the Ardrrossan School Board, who ultimately dismissed him under the following circumstances:—In 1874, and again in 1875, the Board applied for and obtained a special report upon the teacher under section 60, 2, of the Act, but they did not, in the second instance, pass any judgment. On the 1874 report the Board proceeded to dismiss, on the ground that “insubordination and general misconduct” might be considered along with the report. The Board of Education, however, did not confirm their judgment, deeming it doubtful whether the Act would bear them out, but at the suggestion of the Central Board the 1875 report was applied for. The School Board had thus, according to the pursuer, “entered on a course of vindictive and persistent oppression” towards him. He said they gave him no proper teaching appliances, and made such entries in the Educational Return as to lead to the suspension of his certificate for three years. Thus the school lost its Government grant, and in August 1875 the Board intimated that Mr. Marshall was “no longer considered as in the employment of the Board,” who declined to be responsible for his salary. They did not, however, act upon this communication, and subsequently it was recalled. The Board likewise directed their officer to intimate to the children attending the school, that they would be “accommodated at Miss Mackay’s division,” and ordered him no longer to collect the fees at Saltcoats School. The pursuer said that in consequence of all this only fifteen children came two days afterwards, and these were not arranged into standards, there being no grant.

In December 1875 a third special report was applied for by the Board, and the report was made on 22nd May 1876, finding the teacher “unfit, incompetent, and inefficient” in the statutory terms; but still the Board of Education refused to confirm the report. The Board again, on 18th January 1877, applied for a fourth special report, and Dr. Wilson was the Inspector who reported. The pursuer said he was not the Inspector charged with the duty of inspecting that school in the terms of the Act, as he was the senior Inspector of the Eastern District. The report was declared to be untrue and oppressive, and a number of allegations were made against the Inspector’s mode of examining the school. There were also statements as to the bad condition of the buildings, and the neglect by the School Board of their managerial duties in this respect. Their action in August 1875, even though subsequently recalled, had amounted in fact, the pursuer considered, to an abolition of the school. This time the Education Board gave the requisite confirmation. The teacher, Mr. Marshall, thereupon raised an action against the School Board and Board of Education, seeking to have their respective minutes reduced. It is not necessary for our purpose

to go more into detail in the matter; but we may remark that every effort was made by the pursuer in his pleadings to bring them up to the position of relevancy. The mere application for the special report in January 1877 was termed "grossly oppressive and unjust to the pursuer," and the report was, it was said, "incompetent," besides being "untrue and unjust and oppressive,"—terms also applied to the mode of inspection. The judgment of removal was declared to have been "malicious, unjust, and oppressive," and to have been founded on an "untrue, unfair, and oppressive" report, which had been "maliciously and oppressively" applied for; and the whole force of the pleas was summed up in a general statement that the action of the Board had been "grossly malicious, oppressive, and contrary to justice." All this, however, proved in vain, for the Lord Ordinary delivered his judgment on 6th December 1877, sustaining the defenders' second plea, founded upon relevancy, and dismissing the action.

In the note appended to this interlocutor, his Lordship observes that an "old" schoolmaster's case had, by the decisions already pronounced under section 60, 2, been placed in such a position that the judgment of the School Board, proceeding upon a special report and duly confirmed, could not be reviewed. But it is added: "on the other hand, it is equally well settled by the case of *Mochrum* (3 R. 89) that this Court has power to quash and set aside the judgment of a School Board, even although confirmed by the Board of Education, if it can be shown that the power of removal conferred by the statute on the School Board has not been exercised in strict conformity to the requirements of the statute." It is then noticed that the pursuer, Mr. Marshall, took up his position in the first place upon the allegation that Dr. Wilson's report—the special report, indeed, upon which the action of the School Board proceeded, when Mr. Marshall was removed—was not a report in the statutory sense. When we turn to the Act we find that the words are "a special report regarding the school and the teacher from Her Majesty's Inspector, charged with the duty of inspecting said school." The objection raised came to this, that Dr. Wilson was not the Inspector charged with this duty, because, as the Lord Ordinary observes, he "was not the Inspector who on former occasions had inspected the school," and accordingly was not the official properly entrusted with the duty imposed by the statute. His Lordship, however, dismissed this objection with the following remarks:—"I am not aware, and the pursuer does not aver, that one particular person is appointed by Her Majesty to act as sole and exclusive Inspector of a school; and from the pursuer's own statement it appears that a Mr. Hall acted as Inspector of the Saltcoats Public School in 1874 and 1875, Dr. Middleton in 1876, and Dr. Wilson in 1877. But, as I read the statute, what is required is that the necessary special report shall be made not by any one of Her Majesty's Inspectors whom the School Board may choose to select, but by such one of

those Inspectors as the Education Department shall, on the application of the School Board, charge with the special duty of inspecting the school, and reporting on the school and the teacher." Lord Curriehill proceeds to say that upon this point he has no doubt everything has been statutory and regular, while in no other respect are there any allegations of a deviation from the statutory forms. (1) The report was on both school and teacher; (2) the report was duly intimated to the teacher, and the Board's judgment was in the statutory terms; (3) the judgment was duly confirmed. The further grounds, however, of Mr. Marshall's action of reduction of the judgment and confirmation were the malicious, unjust, and oppressive conduct of the School Board, the untrue, unjust, and oppressive report of the Inspector, and the similar conduct of the Board of Education. His Lordship dismissed the allegations against the School Board, with the observation that the *Mochrum* case had authoritatively settled them to be entirely irrelevant. The charges made upon record were not in any view sufficiently specific, although the learned Judge was inclined to think that the Legislature "meant the deliverance of the Board of Education to be final and conclusive, and that it would tend to weaken the position of that Board, and would be an invitation to litigation were this Court to allow inquiry into proceedings which have received the statutory confirmation."

Another point raised by various statements in the record had reference to the alleged entire and wilful neglect of duty by the School Board, in their capacity of managers. Upon this point it is remarked that "if the pursuer had really considered that the defenders were neglecting their duty by failing to provide sufficient accommodation or otherwise, a remedy was open to him, of which he did not avail himself, viz., on application under section 36 of the statute, to the Board of Education." The Board have familiar statutory remedies and means of enforcing upon School Boards due attention to their duties. It is to be noticed that the Board of Education in this instance followed a course of which a suggestion was made in the pages of this Journal in the month of February last; for they gave the schoolmaster an opportunity of defending himself against the charges contained in the special report. He took advantage of the invitation given to him, and, as Lord Curriehill says, "submitted to the Board a long paper of remarks upon Dr. Wilson's report, which was in the hands of the Board for some time before the judgment was confirmed. That paper of remarks was, at my suggestion, produced by the Board, and it is found to contain a very full statement of all the pursuer's alleged grievances." The Lord Ordinary, in conclusion, summarizes his opinion under five heads, holding that (1) the School Board's judgment is not reviewable on its merits; (2) that there is not any departure from statutory forms; (3) that there is not a sufficient case of oppression set forth, even supposing that to be a relevant ground of reduction;

(4) that the protective confirmation by the Education Board is equally non-reviewable; (5) that no relevant case of oppression is stated against that Board, even were any such case relevant.

It is extremely difficult to see how a really relevant case of oppression could be made out at all where there has been strict compliance with the forms required by the Act. It would be almost, we think, necessary to have some specific charge of corruption, and some very distinct collusion between the two boards. Each is a public body, the one elective and responsible, by far the best of safeguards; but even suppose a case wherein local feeling gets the upper hand, the Board of appeal have a veto, they are not influenced by local feeling or accessible in the way in which possibly at times local Boards might be, and accordingly when they confirm it is apparent how strong must be the proof to rebut such presumptions of fair dealing. There must, indeed, be something far more specific than mere general allegations, something to which it is easy at once to point.

If, as in this case, the School Board apply again and again for a special report upon the teacher, that surely alone is not oppression. They may have considered, there is no reason to doubt that they did consider, the teacher was not doing good work for them, and so they were bound to act upon their belief. In conclusion, it may be noticed that it was not the one School Board throughout which acted in this manner. The first report was applied for in 1874, the last in January 1877, so that when the Board first acted in the matter they were the original 1872 Board, whose term of office, of course, had expired long prior to 1877. Whether the second Board was formed of the same members as the first one does not appear, nor, indeed, does it in the least signify, for there had been in any view a new election, and a fresh opportunity for the ratepayers to choose their representatives.

A PROCURATOR-FISCAL—WHAT HE WAS, WHAT HE IS, AND WHAT HE WILL BE.

NO. XIII.

THE responsibilities of Procurators-Fiscal as regards damages was the interesting point at which we took leave of our readers in last number. We find our labours as to these responsibilities very much abridged by the subject having been fully and exhaustively treated in this Journal in 1858 (vol. ii. 395). The results at which that writer arrived may be thus stated. In order to support an action of damages against a Procurator-Fiscal in the ordinary case, there must be a concurrence of malice on the defender, and a want of probable cause. Malice alone is not sufficient, because a person actuated by the plainest malice may nevertheless have a justifiable reason for

prosecution. On the other hand, the substantiating the accusation is not essential to exonerate the defender from liability to such an action, for he may have had good reason to make the charge, and yet be compelled to abandon the prosecution by the death or absence of witnesses, or the difficulty of producing adequate legal proof. The law therefore only holds him responsible where malice is combined with want of probable cause. What shall amount to such a combination of malice and want of probable cause is so much a matter of fact in each individual case as to render it impossible to lay down any general rule on the subject; but there ought to be enough to satisfy any reasonable man that the defender had *no ground for proceeding but his desire to injure the accused*. The cases from which these deductions are made are ranged under two heads—the *first* where a person is bound to speak or act in the performance of a public duty, and, *secondly*, where a person commences proceedings of his own mere motion. In the first class the defender is said to be accorded *protection*, and in the second he has *privilege*.—*per* Lord Justice-Clerk, in *Hamilton v. Anderson*, 11th June 1856, 18 D. 1013. It is this *protection* which Procurators-Fiscal, along with private prosecutors and officials, possess in order to secure them against the consequences of mistakes in the discharge of duty. The early case of *Arbuckle and Taylor* (1st May 1815, III. Dow, 160, particularly Lord Eldon's remarks, pp. 180-2) was a case of a private prosecutor who had the Fiscal's consent to prosecute, but still the principle of law was there broadly stated to be "that the public interest requires that a prosecutor should be protected if he acts without malice, and has probable cause for the proceeding."

Later decisions have, however, created some anxiety in the minds of Procurators-Fiscal. The cases of *Bell v. Black and Morrison*, 28th June 1865, 3 Macp. 1026, and *Nelson v. Black and Morrison*, 26th January 1866, 4 Macp. 328, showed the competency of actions of damages against Procurators-Fiscal without the allegation of malice, and without probable cause. The present Lord President, then Lord Justice-Clerk, remarked in the earlier of the *Black and Morrison* cases, "There is a class of cases where a Procurator-Fiscal is protected. I mean when he prosecutes an offender *ad vindictam publicam* for a criminal offence, and where the prosecution fails on the merits, and it turns out that the offender is innocent." "There is a protection given by law to every one prosecuting criminal offences. The prosecutor may be pursuing for his own private satisfaction, but he is none the less doing it for the advantage of the country, and he is entitled to protection in discharge of this duty." But reverting to the case before him, and as explaining the course which the Court were to follow in its disposal, his Lordship added, "On the ground that this was the use of an illegal warrant, I think there is no necessity for any averment of malice or want of probable cause."

Against these *dicta* had to be placed those in *Mains v. Macdulloch & Fraser* (9th July 1861, 23 D. 1258), where, in an action of damages against Procurators-Fiscal for incarceration on a warrant under a libel which had been found irrelevant, the First Division found: "that the elements of malice and want of probable cause should be inserted in any issue to be granted." To the general public such a warrant seems to be an equally illegal one with a warrant that a Sheriff had satisfied himself he could and should grant. Still it is to this thin and rather impalpable distinction that the opposite decisions in these cases must be attributed. Lord Kinloch, the Ordinary, in *Mains'* case remarked: "The privilege may be forfeited by formal irregularities in the proceedings. But in the present case the Lord Ordinary can find nothing in the record with reference to the leading ground of damage, except that the petition to the justices was not well or relevantly laid, and that the justices pronounced a wrong judgment, and by this wrong judgment sent the pursuer to jail. The Lord Ordinary cannot distinguish the case from that of an accusation unfounded on its merits, but not alleged to have been brought maliciously. A mistake in relevancy cannot, he thinks, be more unfavourably dealt with than a mistake in the substance of the charge. He is therefore of opinion that an issue which lays the act merely as wrongful is not an issue which meets the requirements of the case." The Lord President (Lord Colonsay) takes up rather different ground:—"It was maintained to us that a Procurator-Fiscal had no privilege, and the case of *M'Crorrie v. Sawers* and other similar cases¹ were referred to in support of that view. It was further, on special grounds, argued that on the face of these proceedings the charge against the pursuer was of such an extraordinary character, viz., unlawfully entering upon a public highway, which was a thing in itself impossible, that therefore there could not be any necessity for taking an issue of malice and want of probable cause; that the case was out of the course altogether when there is gross irregularity on the face of the proceedings. Mere failure of success on the part of the prosecution is not of itself a ground of action, but there may be failure under circumstances which make it pretty obvious that there was malice and want of probable cause in raising the action, in which case the party accused may have his action, after acquittal, on the ground of malice and want of probable cause. There is another class of cases where the libel may be held to have been irrelevant, or thought to have been ambiguous. I am not prepared to say that where a libel is found irrelevant it follows that the party who was accused—who was apprehended on the charge, and then accused and put to trial—is to have his action of damages merely because the libel was found irrelevant. I do not think there is any reason for that. There

¹ *M'Crorrie v. Sawers* (10th Feb. 1835, 13 S. 443); *Kelly v. Stuart* (16th May 1834, 7 W. & S. 343); *Hill v. Dymock* (7th July 1857, 19 Macp. 955); *Williamson v. Linton* (18th March 1858, 20 Macp. 808).

may, indeed, be such gross irrelevancy on the face of the libel as should have deterred any man from stating the accusation, and any Judge from proceeding." It is this last sentence which alone seems to give a clue in the labyrinth, followed up as it is by this explanation: "Such as if there were no statement about killing a hare at all, but only that A. B. on such a day went along the high-road. That might have spoken for itself; and in such a case it may not be necessary to libel malice and want of probable cause. But that is not the nature of this case. It was a question of relevancy which the Court of review were called on to decide."

Lord Colonsay should have contented himself with this as his ground for the distinction he was attempting without going on to justify the Procurator-Fiscal's enforcing an illegal warrant. "The conviction also was ambiguous, for it was a conviction on alternative charges. But that was the conviction of the justices"!!! With the responsibilities which have been held to attach to the Fiscals, no Fiscal should attempt to enforce an ambiguous warrant, and accordingly, in a late Haddington case, the Fiscal not only did not enforce the warrant, but when a suspension was brought, he intimated that he would not appear to support it. It is impossible to see what other course was open to the Fiscal, and Lord Colonsay's remarks as to the sentence in *Mains'* case and its enforcement can only be explained by his Lordship's remarks in *Williamson v. Linton* (18th March 1858, 20 Macph. 812): "The position of a Procurator-Fiscal is a very peculiar one; and when I say that there is matter here that may go to trial, I do not mean to commit myself to this, that the Procurator-Fiscal is in all cases responsible for the imprisonment that follows on a prosecution which he has instituted. When he brings forward a case and states it to the competent tribunal, and that tribunal, hearing parties on each side, proceeds, with or without the intervention of a jury, to find the complaint proven, and that the crime was committed, and pronounces sentence, the party against whom the charge has been made is not then in the hands of the Procurator-Fiscal, *but of the law*, and the Procurator-Fiscal cannot then prevent imprisonment, even if he wished it." Lord Colonsay was an old Sheriff (of Perth), and had constitutional notions as to the Procurator-Fiscal being only his hand or *alter ego*. But these notions logically led, as we showed in last article, to the Sheriff or Sheriff-Substitute, and not the Fiscal, being responsible for illegalities. With the Fiscal held responsible, and not the Sheriff, the case is changed, and the Fiscal must protect himself. This hesitancy on our part to accept the *dictum* of one Lord President, is borne out by the remarks which another Lord President (Hope), who had been also a Sheriff (of Orkney and Zetland), made in *M'Crorrie v. Sawers* (10th Feb. 1835, 13 S. 444): "If the Procurator-Fiscal acted gratuitously like the Justices of Peace it might be necessary to libel malice to make the summons relevant, and I should have hesitated to adhere to the interlocutor. But he is an officer who is fully

remunerated for his trouble"! Although this was in the good old times before 1851, while Procurators-Fiscal were on fees, one cannot understand such a ground of judgment. The correct principle of that case of *M'Crorrie v. Sawers* is that laid down by Lord Corehouse, the Ordinary, that "the Procurator-Fiscal is bound to know the limits of the district within which he is authorized to act, and a *bona fide* mistake in that respect is no bar to an action of damages, more particularly in a case like the present, affecting the liberty of the subject. But though his alleged *bona fides* is no bar to the action, and therefore cannot be sustained as a preliminary defence, it may have a great effect with regard to the amount of the claim against him." The case of *M'Crorrie v. Sawers* was peculiar in this respect, that it related to an island in a fresh-water loch. Had it been in a salt-water estuary the Acts of 1 William IV., c. 69, and 1 & 2 Vict., c. 119 would have placed it within the jurisdiction of the Sheriff, whose commission the Fiscal held, as the jurisdiction of maritime Sheriffs is concurrent over the whole intervening waters. But there the criminal offence alleged was said to be committed in the Island of Inchmirran, in Loch Lomond, "in Stirlingshire," of which shire the defender was Procurator-Fiscal, while it was admitted that the island was in Dumbartonshire. It is, to say the least of it, a very strong thing to put the two cases of *Bell* and of *Nelson v. Morrison and Black*, the Cupar Fife Fiscals, in the same category, although it would seem that this was the *ratio decidendi*.

(To be continued.)

JUDICIAL STATISTICS OF SHERIFF-COMMISSARY AND JUSTICE OF PEACE COURTS FOR 1876.

(Issued by authority.)

THE first table is a comparative one of the business in the Sheriff's *Ordinary* Courts in the years 1872 to 1876 inclusive. We have in former notices of these annual statistics remarked, and now repeat, that this table is perfectly ample, exhaustive, and sufficient of itself for any practical purpose, and that subsequent tables are of little or no importance. We doubt if ever they are read by many. The first branch is the most material, showing the state of business in Sheriff Courts.

Number of cases within the years	1872	1873	1874	1875	1876
Causes in dependence at the commencement of the year	1775	1801	1912	2137	2078
Causes initiated within the year,	6835	6599	7216	7791	7376
Total,	8610	8400	9128	9928	9454

The remark here is, that notwithstanding the legislative lash and spurs applied to ensure despatch, the number of cases left off at the close of the year have increased in almost exact proportion to the new cases.

The second branch is absolutely without any benefit. It is "*the character (?) of cases*"—viz. (1) initiated by summons; and (2) by petition or otherwise than by summons. Since by the Act 1876 all actions in the Sheriff Courts are introduced by petition, this division must cease. It will henceforth be perhaps necessary that a distinction should be made between ordinary and summary actions. But the recesses being now so brief, and as all actions may proceed in vacation as well as in session, the distinction seems unnecessary. It will be left to the Sheriff to distinguish between cases which require "*extraordinary* despatch," which the mere initiatory writ cannot now, and indeed never could, disclose.

The third table sets forth (1) the causes disposed of by final judgments within the year; (2) causes taken out of Court otherwise than by final judgments; and (3) causes in dependence at the end of the year. It will be sufficient to learn that, in the year 1876, under No. 1 there were 6173; under No. 2, 1462; and under No. 3, 1819; being very nearly the proportion given under former years. So, under the next branch of decrees *in foro* and in absence, the year 1876 gives 2886 for the first and 3287 in absence, showing a greater proportion of undefended than defended cases. The expense of a decree in absence will now be greatly increased by the condescendence attached to the petition, and it is a matter for serious consideration whether half fees should not be held sufficient in cases of decree in default. The fifth division is "*Judgments in foro* by the Sheriff in the first instance, and by him on appeal, and by the Sheriff-Substitute." The sixth division is precisely a repetition of the same results minuted in the fifth section of the Sheriffs' work, giving, for the year 1876, in the first instance 47 judgments, and 1041 appeals.

The seventh section gives the result of appeals. In the year 1876 there were appeals 774 judgments of the Sheriff-Substitute affirmed, 162 reversed, and 105 mixed judgments. The eighth division sets forth "*An analysis of causes decided by decrees in foro as regards costs.*" This division must have occasioned great trouble to Sheriff-Clerks. It cannot be held correct, and is of no practical use whatever. The ninth division gives "*Miscellaneous and administrative business,*" and is of considerable importance. We give the items under the year 1876:—

Applications under Bankruptcy Act,	.	.	.	2996
" " Poor Law Acts,	.	.	.	642
" " Lunacy Acts,	.	.	.	2339
" " Registration of births,	.	.	.	785
" " Education Act, 1872,	.	.	.	241

Applications under Master and Servant Act,	49
" " Admission and suspension of Sheriff-Officers,	54
" " Service of heirs,	609
" " Appointment of tutors and curators,	32
" " Civil prisoners for aliment,	112
" " Sanitary Act,	76
" " Merchant Shipping Act,	36
" " Fugæ warrants,	95
" " Lawburrows,	14
" " For Poor Roll,	1129
" " Decrees in absence from Ordinary Court,	3287

(Note.—How can these cases be considered *administrative* when appearing before as *judicial* ?)

Miscellaneous applications, 1577

(Note.—This large number is quite unintelligible after so exhaustive a record of all possible applications.)

The first table concludes with applications for *cessio bonorum*, showing, in the year 1876, 212 applications, but how these were disposed of is not very intelligible, and apparently shows no refusal of the "*lamentable remedy*."

It will thus be seen that this first table substantially serves every practical purpose. A column is, however, added showing the quinquennial average ending in 1876. This must have cost no small degree of minute calculation, but its benefit is *nil*.

There follows a divisional table of the total causes in 1876, in the various Sheriff Courts of Scotland. Glasgow, as may be expected, boasts of the greatest roll, showing 1529 causes. Edinburgh comes next, with 754. The numbers gradually drop off, and no less than three Courts record solitary units, whilst three appear to have experienced a strike or lock-out! One county has the unfortunate note affixed "the return is defective, and not *suited for publication*"! The "oldest inhabitant" is thirled on Ayr, and its birth is stated to have been so far back as 1865. No less than 1662 cases date their nativity from 1875, whereof no less than 629 are natives of the western metropolis. One striking fact (if it be fact) is that of 10 cases in dependence in one county, one saw the light so far back as 1874, and nine in the following year, and were all in life at the commencement of 1876. A sixth table, covering two folio sheets, gives an analysis of procedure in causes concluded by judgments *in foro*. This table must have been prepared with great labour, but seems labour wasted. Take for example the minute table headed "Number of weeks *first* between date of Sheriff-Substitute's *possession* (?) of *completed* (?) process, and, *second*, date of judgment." It is pleasing to discover that the great majority of

judgments by the Sheriff-Substitute are given within one week. There is, however, a tell-tale folio set down for lingerers. One unfortunate case appears to have been laid or mislaid on the desk of a Sheriff-Substitute for 42 weeks!

A sixth table gives the number of appeals to the Sheriff. Under recent statutes these are reduced to two, or at the most four, stages—but ten appeals are found taken four times in the same process. Strange to say, there are two empty columns appropriated to five, six, and above six appeals, and as might be expected they remain empty, seemingly to preserve the symmetry of the foolscap. Several tables give information as to procedure in bankruptcy and poor law, and other administrative procedure. The eighth table sets forth the results of the process of *cessio*. The ninth and tenth, covering five folio pages, give the comparative business in that hybrid tribunal equivocally called the “Debts Recovery Court.” Now that the procedure in Ordinary Courts has been so much accelerated, it would be well that this anomalous judicial section was abrogated. The Small Debt jurisdiction might be extended to £20, with leave, perhaps, to a defender to have the case removed to the Ordinary roll, where the sum in dispute is above £12.

Next follow lengthy tables of the Sheriffs Small-Debt Courts, with most minute and tiresome details, of not the slightest public or practical importance. These Courts appear still to be the favourite resorts for justice, as shown by these tables. But the Circuits, now that railways intersect the land from Dan to Beersheba, have greatly diminished the number of cases, and appear in many instances no longer to be necessary. In *eight* of these district Courts the total cases within the year 1876 were less than *ten*. The minute subdivisions of the results of the Small-Debt jurisdiction must have proved no small annoyances to the Clerks of these Courts as well as to the compiler of these tables, and it is labour entirely without the least fruit.

Statistics are valuable when distinct and reliable, and necessary to illustrate essential and cardinal facts and principles; but, with great submission, there is in these copious and minute tables the old problem of the coveted needle being sought, and we fear sought in vain, in a huge bundle of useless straw.

H. B.

CURIOUS CASE OF MISTAKEN IDENTITY.

[We have been favoured with the following interesting Paper by one of the Counsel for the defence of the prisoners mentioned.—*Ed. J of J.*]

THE following case of mistaken identity arose out of what was known at last Spring Circuit at Glasgow as “the Govan murder,”

in which an unfortunate cabman lost his life. It is so remarkable in some respects that it deserves to be chronicled. At the Glasgow Spring Circuit, 1877, three men, named Thomas Farrell, Thomas Hannacher, and John Joyce, were charged with the wilful murder of Alexander M'Crae, cabman, by stabbing him with a knife. The facts of the case admit of short narration. About nine o'clock on the preceding New Year's Eve, being a Sunday, three employees in the dockyards of Govan—and residing in that district of Glasgow—were being driven *home* in a cab from Renfrew, a distance of three miles. When about one half of the way, they came upon two men struggling together, and as one of the two was shouting for help and seemed in danger, the cabman pulled up his horse, and two of the persons inside got out and went to see what was the matter. Apparently, however, resenting this interference, the two combatants, on their approach, immediately ceased their struggle and turned to attack the new comers. Seeing this, the latter immediately ran back and got into the cab; but before the cabman could get the door of it closed, he was stabbed by one of the two assailants, who had now come up. He was able, however, to mount the box and drive a short distance; but, just as he was starting, one of the two men, while attempting to get at the persons in the cab, was kicked in the left cheek by one of these, receiving a severe and distinct wound. After driving a few hundred yards, the cabman, feeling faint, got inside the cab; and an examination being made, a deep wound caused by a knife was found on his stomach. As by this time the cab was approaching Govan, the occurrence was quickly made known to a large number of people who were met upon the road; and a hue and cry was at once raised. Thomas Farrell was caught a few minutes after the affair was made known, while running along the streets of Govan, was taken into the presence of the cabman almost immediately, and was identified by him as one of the men who had assaulted him. On the following day he was brought before the three men who had been passengers in the cab, and was likewise identified by all of them; one of them putting his identification apparently beyond dispute by pointing out that he had, as just mentioned, kicked one of the assailants on the left cheek, leaving a mark; and Farrell was seen to have such a mark. The police authorities, being upon this satisfied that Farrell was guilty, looked about for his associate in the crime. Two men, named Hannacher and Joyce, were soon arrested upon suspicion, and Hannacher was identified by the cabman before he died, and by the three others, as having been participant. Joyce was not identified. In the declarations which Hannacher and Joyce separately emitted, they agreed in stating that they had met Farrell (whom they had not previously known) in Renfrew on the Sunday, and had spent part of the day with him there, drinking in an inn; that they had started together to go home to Govan, where they

all resided, in the evening, but that Farrell had soon left them and gone on along the public road in front, and that they themselves had ultimately gone home by a footpath through some fields, and had not seen the cab, and knew nothing of the occurrence. In addition to this they made certain other statements as to their having gone home to their lodgings the same night, etc., which were found, however, to be quite false. Farrell's statement in his declaration was this: he admitted having been in Renfrew during the day, having met Hannacher and Joyce there, and having been drinking with them in an inn. He further stated that he had started to walk to Govan with them in the evening; but that just outside Renfrew he had parted company with them; that he had walked home alone, had met no cab, and knew nothing of the occurrence. He accounted for the cut on his cheek by saying that shortly after leaving Renfrew he had, under the influence of the drink he had taken, fallen on the road, and cut it. Shortly after Farrell's declaration had been emitted, two persons came forward and made a statement that they had been walking from Govan to Renfrew on the evening of the event, and had met Farrell (whom they personally knew) near Govan, and that several minutes afterwards they came upon two men fighting, and immediately after met a cab which was approaching the combatants when they passed it. This, it should be noticed, corroborated a statement made by Farrell in his declaration that he had met these men. It should also be added that, so far as the external appearances went, the wound on Farrell's cheek might have been caused either by a kick or a fall.

These, then, were the leading facts which the Crown prosecutors had before them, and, in preparing the case for trial, they found themselves placed in a difficult dilemma. It was, in the first place, clear that the declarations made by Hannacher and Joyce were false,—Hannacher being distinctly identified,—and in the second place that, as all the evidence went distinctly to show, only two persons were directly concerned in the crime. The cabman and the men in the cab were certain that only two persons were participant, and there were here three prisoners. But naturally the Crown authorities were quite satisfied, looking to their declarations and other incidents, that Hannacher and Joyce had been together all the evening, and that Joyce, if not accessory, at least knew all about the affair. In these circumstances, Farrell and Hannacher being clearly identified by all the persons who were present, and Joyce not being identified, it was resolved to give Joyce the opportunity of becoming a witness, relieving him thereby, as "Queen's evidence," from all liability to prosecution. Joyce expressing willingness, his precognition was accordingly taken, and was to the effect that Farrell and Hannacher were guilty of the deed, he himself being close by at the time, but not taking part in it. As the day of the trial, however, approached,

Joyce, on being again carefully questioned on the part of the Crown, and by the agent for the defence, displayed great hesitation and confusion in replying to interrogatories put to him, and became self-contradictory in details. And, finally, on the day previous to that fixed for the trial, Hannacher made a confession to the agent for the defence, to the effect that Joyce and he were alone concerned in the crime, and that Farrell was not present at all. Upon this being intimated to the Crown prosecutors, they were, reading the evidence in a new light, ultimately forced to the conclusion, even in the face of all the direct evidence of identification, that Joyce was, after all, the guilty party, and that Farrell was wholly innocent. And accordingly the case against Farrell was at once withdrawn, and Hannacher, having pleaded guilty to culpable homicide, received a sentence of penal servitude. Thus the guilty Joyce escaped as "Queen's evidence." Yet no possible blame can be attached to the Crown prosecutors for the mistake, as the case, as one of mistaken identity, is most remarkable. We have Farrell distinctly identified by the dying cabman within an hour after the occurrence, and on the following day by the three other persons present. And what especially seemed to place this identification beyond all reasonable doubt was the fact that Farrell had a mark on the left cheek, on the very spot where one of the men had kicked his assailant. Had Joyce also such a wound on his cheek? It was found afterwards, from independent testimony, viz., of his having been seen washing a wound in the house he had gone to the same night, that he had; but, owing to his non-identification, attention had not been called to it at the time he was arrested. Farrell and Joyce were men of very considerable resemblance, particularly in regard to size and shape of body. There can be no doubt, therefore, that the cabman was deceived by this resemblance in the hurry of the struggle, the night being pretty dark. And so with the three persons in the cab (who all gave their testimony with perfect *bona fides*), and who, if they had any dubiety, would no doubt have it dissipated by the curious fact that Farrell had the very wound on the left cheek which they would naturally look for.

It is obvious that if Joyce had been a little more audacious and consistent in his false statements, and if Hannacher had not chosen to confess, Farrell could hardly possibly have escaped conviction. The evidence of those persons who said they met him on the road near Govan, prior to their coming to the scene of the occurrence, would naturally have been looked upon as merely a desperate attempt at proving an *alibi*. The case may profitably be regarded as showing the danger of placing too implicit reliance upon direct evidence in questions of identification. Wherever circumstantial evidence is found to be at variance with direct testimony, the latter ought always to be received with the greatest caution.

Reviews.

A Treatise on the Law of Arbitration in Scotland. By JOHN MONTGOMERIE BELL, Esq., Advocate. Second Edition. Edinburgh: T. & T. Clark. 1877.

It is now upwards of sixteen years since the first edition of this useful work appeared, and it has ever since maintained a high place as an authority on the subject which it professes to treat. During the years which have elapsed since its original publication there have been accumulating, of course, a considerable number of decisions relating to the law of arbitration, and these we now find embodied in the present edition, which has also, we are told in a prefatory note, had the benefit of a few final additions and corrections by the late author, whilst it has now been produced under the careful and experienced supervision of Mr. Kirkpatrick. It is almost unnecessary to say anything in favour of a work which has been already received with so much favour by the profession; in it is contained every information at all connected with arbitration; in fact, the only fault we have to find with the book is that it is too voluminous; it might, we think, have been curtailed with advantage. There is an able historical introduction, which commences by a notice of the first *arbitration case* of which the history has come down to us, viz., that in which Paris was the arbiter and the three goddesses Juno, Pallas, and Venus the contending parties. Passing from such mythical accounts however, the history of arbitration is brought down to the time when it was formally recognized as a competent method of settling disputes in this country, and when, in order to make the proceeding more binding on the parties than it had hitherto been, the 25th of the Articles of Regulation of 1695 was passed, declaring all reductions of arbitrations to be incompetent, except upon the grounds of corruption, bribery, and falsehood. The nature and object of the contract of submission is then discussed, first independently of the above enactment, and afterwards with reference to it. The constitution and construction of the contract is brought under our notice, the general rules relating to it being laid down and the exceptions carefully pointed out. In alluding to the rule which makes it imperative for the validity of submission that the arbiters should be named in it, the author does not allude to one form of submission which we lately met with, and which we mention here, but more as a historical curiosity than anything else. It occurs as an ancillary clause in a *Band of Friendship* formed between certain noblemen and gentlemen in the year 1578 for the repressing of divers troubles in the country. After binding the parties to be true to each other, the deed proceeded—"Gif it sall happen, as God forbid, ony different, slaughter, bluid, or other inconvenient, to fall out amangs us, our friends, servants or dependers, the same, of what-

somever wecht or quality it sall be of, sall be remitted to the decision and judgment of the remanent of us, wha sall have power to judge and decern thereintill, whase sentence and decreet baith the parties sall bide at, fulfil, and observe without reclamation, and sall be as valid and effectual in all respects, and have as full execution, as the same had been given and pronounced, after cognition in the cause, by the Lords of Session, Justice-General of Scotland, or any other judge ordinar within this realm."

We must pass on, however, to consider the general plan of this work. After the contract of submission itself is considered, the parties to the contract are next treated of, and the subject-matters which may be competently submitted to arbitration. Following that, we have fourteen chapters devoted to the powers and duties of arbiters and oversmen; the award itself is next discussed, and the subject of the judicial reference is also carefully considered. The last of the six books into which the work is divided is devoted to a variety of miscellaneous subjects which have not fallen within the scope of the other books. Some of these are of the utmost importance, such as the use of action or diligence upon an award, the grounds of challenge of an award, the remuneration of an arbiter, and the like. As an appendix we have no less than thirty-two styles of deeds which are connected with the various steps of a submission. Altogether, we may safely say that this volume contains everything which bears on the subject of arbitration. Sometimes indeed, as we have before hinted, the style is somewhat diffuse, and the same information is repeated at different parts of the book, but this is a fault on the right side. Mr. Kirkpatrick's care and attention is conspicuously shown in the notes, the references being brought down to the latest date and the latest editions, while not a little entirely new and instructive matter has been added by his hand. We have much pleasure in recommending the second edition of this useful work to the attention of the profession.

The Law relating to Trustee and Post-Office Savings Banks, with notes of decisions and awards made by the Barrister and the Registrar of Friendly Societies. By URQUHART A. FORBES of Lincoln's Inn, Esq., Barrister-at-Law. London: Hardwicke and Bogue. 1878.

IN the preface the author hints that his manual on savings banks may prove useful both to the trustees and managers of such institutions, and to depositors. To the former of these classes Mr. Forbes's book will be of some use, but he is certainly too sanguine in hoping that the latter will be able to derive much assistance from a work which necessarily embodies so much statute law. It is certainly convenient, especially for those who are much occupied with the management of savings banks, to have in a handy form the various Acts which regulate these most useful institutions. Mr. Forbes has besides annotated these Acts, giving not merely cross-

references, but also notes of points decided by the Registrar of Friendly Societies, and also by the Barrister-at-law, appointed under the Savings Banks Acts (an office which has been now abolished). Although these decisions possess no binding authority, and may be disregarded by the present or any future Registrar, they form a practical guide of some value to persons engaged in the administration of savings banks. We think, however, that Mr. Forbes would have rendered his work more serviceable if he had digested the statutes, and thrown them so far as possible into one series of consecutive clauses, and so have dispensed with the necessity for the repeated use of cross-references, which are a little bewildering to the lay mind. It is not sufficient to point out that two clauses in separate Acts must be construed together; but the author of a manual such as Mr. Forbes's ought to state the construction which is, in his view, to be put upon them. The index is very full, and will be found of great use by all who have occasion to consult the Acts. The Acts are prefaced by two chapters, in the first of which an interesting, though rather meagre, account is given of the rise of savings banks, and of the successive enactments which have been passed affecting them; and the author points out the necessity for a thorough revision of the statutes relating to the Post Office Savings Banks. In the second chapter Mr. Forbes deals with the jurisdiction conferred by statute on the Registrar of Friendly Societies, but it is a little difficult to gather how the powers, formerly vested in the Barrister-at-law appointed under the Savings Bank Acts, have been distributed. It is said that certain of them have been conferred on the Registrar, but the author has omitted to state to what quarter application must be made to put the remaining powers in operation. A reference to the index, however, shows that these powers are now vested in the Solicitor to the Treasury; but the reader requires to consult several clauses of Acts of Parliament, and notes upon them, before he ascertains this important point, which ought certainly to have been stated in the introductory chapters. On the whole, however, this is a useful and handy manual, and contains much valuable information, and by bringing the existing statutes together, enables the student to gain more easily a knowledge of the important laws affecting the interests of large numbers of the working classes than is possible from the Acts themselves, as they stand in the statute-books of their respective years.

Obituary.

JOHN BERRY, Esq. of Tayfield, Advocate, died at Mazzomonte, near Nice, on the 17th of December, at the comparatively early age of fifty-three. Mr Berry was educated at the Edinburgh Academy,

where during six years he and his brother, Professor Berry of Glasgow, alternately headed the same class. His university studies were prosecuted at Glasgow and Edinburgh, at both of which universities he distinguished himself. In 1849 he was called to the Bar, where his great natural shrewdness and business aptitude would probably have insured his success. But the experiment was scarcely tried; for on his father's death in 1852 he succeeded to the estate of Tayfield, which afforded him more congenial, and not less profitable, occupation. Situated right opposite to the great and rapidly increasing town of Dundee, beyond the reach of its smoke, though within sight of its chimneys, with the noble estuary of the Tay stretching out before it, Tayfield possessed exceptional advantages for feuing and building purposes. Of these Mr. Berry did not fail to take the fullest advantage. Almost the whole of the now considerable pleasure town of Newport, with its adjacent villas, is built on his lands, and to its development, and the interests of those whom he had induced to become his neighbours, his life was henceforth devoted. The parish church of Forgan being at some distance, he promoted and largely contributed to the erection of a church, which has since been made the *quoad sacra* church of the district. He was a Justice of the Peace, a Commissioner of Supply, a Road Trustee, a member of the School Board, etc.; and far from holding these offices as mere accidents of his position, he was as ready as he was able on all occasions to take the labouring oar in their management. Those of his old friends whom chance or choice brought within the scope of his kind offices will not forget his genial and unostentatious hospitality, and the zeal with which he laboured for their happiness and enjoyment. His temper was eminently cheerful; he had a strong sense of humour, and a lively relish for fun. Considering his years, it was remarkable in how great a degree he exhibited the simplicity and raciness of character for which the old-fashioned Fife gentry were so celebrated. Had he lived a century earlier, the relations which subsisted between him and his old butler, and his still more venerable aunt, would have furnished a bright page in Dean Ramsay's "Reminiscences." As it is, kindly and pleasant as they all were, the remembrance of them will do something to fill the sad blank which the premature death that he accepted so meekly occasions in the wide circle of his relatives and friends. Mr. Berry married in 1858 a daughter of the late Mr. Burn Murdoch of Gartincaber, and leaves a family of two sons and two daughters.

The Month.

The Irish Law Reports.—Our Irish brethren seem at present to be in great distress in reference to the way in which the authorized

series of Law Reports is conducted. For some time past the Lord Justice of Appeal Christian has intimated in no measured terms his opinion of the value of the reports, complaining very much of his judgments being continually misstated in them. At last, however, in an appeal case, *Hone v. Blanchi*, after the Lord Chancellor had delivered his judgment, the Lord Justice said that he agreed with the Chancellor that the appeal should be dismissed with costs, but that was all he could allow himself to say in the case. He then proceeded to state his resolution that, owing to the way in which his decisions had been reported, he would not in future give any reasons for his judgment, but would simply indicate his opinion in a formal manner. In support of this resolution the Lord Justice delivered a long and strong speech, in the course of which he went over in detail a judgment of his in the case of *Lewis v. Lewis*, the *ipsissima verba* of which the Law Reports had professed to give. Certainly the specimens he quotes of the words of the report, as compared with his own MS., do not give a favourable opinion of the accuracy of the former. We may give one sentence as an example. What the Lord Justice really read as part of his judgment was as follows:—

“But when he chooses to follow the very track legislated for, so to say, by the settlement, when he chooses to have the lands conveyed to the trustees of the settlement as such, then I say his attempt to impose any trust whatever is superfluous and inoperative; for on the instant the land passes to the trustees, the trust which the settlement had been holding in readiness for them instantly attaches.”

The above sentence, we are told, appeared in the reports thus:—

“But when he chooses to follow the proviso, and *treat the lands as lock-spitted in by the settlement*, he could not introduce the power”!

If this is a fair specimen of the Irish Law Reports, we confess to having some sympathy with the Lord Justice's complaints. That learned Judge, towards the close of a speech full of very vigorous Saxon, expresses his belief that “in the whole vast ocean of printed matter since the days of Caxton . . . there could not be found, within an equal space, such a mass of utterly worthless rubbish as makes the staple of the eleven Equity volumes of the *Irish Reports*.” These be “prave 'orts,” and we should like to hear what can be said in reply to them. For a genuine philippic, of a sort seldom heard now-a-days, we would recommend to our readers the speech of the Lord Justice as reported in our contemporary, the *Irish Law Times* (24th Nov.) Meanwhile it has created a sensation in the Irish Courts, and considerable regret and annoyance is expressed by the profession at the resolution to which the Lord Justice has come, viz., to deliver his judgment without assigning any reasons therefor.

The Press on Legal Maxims.—The *Pall Mall Gazette* says:—“A

truly extraordinary 'old maxim' of law is that which the *Times* has formulated this morning (Nov. 28) in its leading article on the Portuguese marriage case. The maxim which it cites is made to run thus: '*Consensus facit concubitum.*' No doubt this contains—or at any rate should be deemed, by all well-regulated persons, to contain—a wholesome truth; but it is not exactly the truth conveyed in the principle usually stated as '*Consensus non concubitus facit matrimonium.*'" Even legal periodicals, however, sometimes make a slip. One of the most amusing blunders we ever came across is contained in the twelfth volume of the *Scottish Law Reporter*, p. 423. In giving judgment in the appeal case of *Symington v. Symington*, March 18, 1875, Lord O'Hagan is made to quote, "as a maxim which experience sustains," the words *Nemo repente Juit fur pessimus*, which, though possibly as sensible a reading as *turpis-simus*, is certainly not so usual.

A Laconic Judgment.—We ventured last week to inquire whether a great many of the judgments which are now delivered are not very much longer than is desirable; whether, in fact, it is really necessary that every step of the process by which a learned judge has arrived at his judgment should be set forth, or that every topic that can be suggested in connection with the case should be fully discussed. But we were hardly prepared for so practical a reply to our query, or so excellent an illustration of the advantages of brevity, as has been given by the Master of the Rolls this week. In an administration action, in which the plaintiff and her next-door neighbour and the defendant were examined and cross-examined in court, the learned judge delivered judgment as follows:—"I do not believe the plaintiff on her oath; nor do I believe Mrs. A., her witness. I do believe the defendant on his oath; therefore I dismiss the action, with costs."—*Solicitors' Journal*.

Comfort v. Litigation.—We drew attention some time ago to the manifold discomforts suffered by witnesses in Mr. Justice Fry's Court, and suggested that perhaps a wealthy Inn of Court might, without unduly trenching on its resources, afford its judicial tenant a "cabman's shelter" outside his court. We are still unable to see why witnesses are subjected to such hardships, but we confess with humiliation that we have hitherto been in gross darkness as regards one important purpose served by arrangements which not only drive witnesses out in the rain and cold, but also subject to discomfort parties to pending causes who cannot find room in the court. We now see that affliction subdues the unruly passions of the litigant; cold rain damps his ardour, and the sylvan chilliness of the Lincoln's-Inn gardens suggests to his mind peaceful thoughts towards his brother man, while it brings to his imagination visions of success in litigation dearly bought by rheumatic old age. In a

case of *Dolman v. Danson*, which was in Mr. Justice Fry's paper on Wednesday, counsel announced that the case was expected to have occupied much time; but, "owing in great part to the structural difficulties of the court," the parties had met in Lincoln's-Inn gardens, renewed their former friendship, and settled the matter in dispute.—*Solicitors' Journal*.

Judge and Jury.—At a Jury Court held at Greenlaw on the 18th of December, the newspapers report a curious scene. The learned Sheriff of the county having been somewhat late in taking his seat on the Bench, a juryman rose and said, "My Lord, if I had been a minute late I would have been fined;" another juryman made a similar observation, and the public in the Court-room applauded. The Sheriff then ordered the Court to be cleared, and the ballot for the jury was proceeded with. So far the Judge had only exercised his undoubted prerogative; nay more, the conduct of the jurymen who made the observations referred to was such that we think the Sheriff would have been quite justified in committing them for contempt, if he thought such a procedure judicious in the circumstances. What he did do, however, is not so easily defended. On one of the gentlemen who had spoken being chosen to sit on the jury, the learned Sheriff intimated to him that he need not come—in fact, ordered him to retire. Now there is no doubt that both the prosecutor and the accused have five peremptory challenges, but this is the first time we ever heard of a judge interfering with the composition of an assize. It is in our opinion a most unconstitutional procedure, and we question if the sentence following, or the verdict of a jury which had been interfered with in such a way by the Judge, would be sustained on a suspension. Meanwhile it is holding out a premium to impertinence if every juryman who chooses to conduct himself in an unbecoming manner towards the Judge is to be excused from serving on the jury.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF PERTHSHIRE.

Sheriff BARCLAY.

THOMAS F. MACFARLANE v. DAVID PHILIPS.

Libel—Amendment of Record under the Sheriff Courts Act 1876.—An action was brought concluding for damages in respect of a libel in a newspaper. At the commencement of the pursuer's examination it was discovered that an error in date had been committed in the record. The defender thereon objected to the proof proceeding. The pursuer moved, under the Act 1876, to be allowed to amend the record. The defender objected, and the Sheriff-Substitute reserved the

point, and allowed the proof to proceed. The following interlocutors were subsequently pronounced:—

*“Perth, 22nd August 1877.—Having heard parties’ procurators, and made avizandum with the process, proofs, and debate,—On the motion of the pursuer, made at the diet of proof, allows him to amend the first article of averment in his condescence by substituting the words ‘Wednesday the 30th May’ instead of ‘Tuesday the 28th,’ but finds the pursuer liable to the defender in £1 of expenses for the inaccuracy: Finds as matters of fact, first, the defender is the editor and the advertised printer and publisher of the *Strathearn Herald* at the date of the publication of that paper in which the article forming the subject of the action was inserted; second, the said newspaper, published of date the 2nd June 1877, contained an article headed ‘Muthill Midnight Brawlers,’ and setting forth that a number of noisy individuals had come to Muthill from a neighbouring town to attend a lottery, and one of the more prominent brawlers was ‘a portly knight of the Camera,’ and that the brawlers were drunk, and broke some windows of the Black Bull Inn, and otherwise misbehaved themselves, which had been reported to the authorities; third, the said paragraph is libellous, and was of and concerning the pursuer, and was so understood and believed by himself and by many of the inhabitants of Crieff, where he resided, and had for some years carried on business as a photographer: Therefore decerns against the defender for ten pounds of damages: Finds the defender liable in costs on the scale of the award: Remits the account thereof to the auditor to tax, and decerns. HUGH BARCLAY.*

“Note.—The correction of the record is of a mere clerical error, and was induced by the defender’s own newspaper article, where Tuesday was inserted instead of Wednesday. The defender made no objection in preparing the record, and it would be a miscarriage of justice now to send parties out of Court when the case is ripe for judgment. There is no question but that the article is libellous. There can be as little doubt that it was intended for the pursuer, and so it was understood by him and many of the public. It is no plea that some of the general public did not so understand its application, and that others took it as a joke. It might appear as such to those to whom it had no application, but it was far different to the person held up to ridicule, and whose professional business depended on public favour amongst many competitors. It clearly was meant to apply to the pursuer and another Crieff man. The ‘brawlers’ were represented to have made a foray from ‘a neighbouring town,’ and that one of their number was ‘a long-legged, swarthy-complexioned son of Crispin,’ and another was ‘a portly knight of the Camera.’ Crieff is the next town to Muthill, and the pursuer was, on the Wednesday before the publication of the paragraph, at a bazaar or lottery at Muthill, and had been at the Black Bull Inn. The personal appearances of the pursuer and his friend the shoemaker precisely corresponded to the Crieff brawlers as represented in the paragraph. But certainly there were no broken windows or anything approaching to a brawl or riotous proceedings, and the pursuer assuredly was not drunk. When the pursuer complained of the paragraph the defender was bound to give up the person who ‘communicated’ the paragraph, which, of course, on its face appears as having emanated from Muthill. If he refused or declined to reveal the author, then he took his place and liability. It is no excuse that in the next issue of the newspaper, on the authority of the anonymous author, the defender inserted a paragraph to the effect that it did not apply to the pursuer or to another named photographer in Crieff, to whom it could not apply, seeing that there is no evidence that that gentleman was at Muthill on any day of the week in which the riotous conduct was said to have happened. It was very easy, when the article was complained of, to say that it did not apply to the pursuer or to another photographer to whom it could not possibly apply. It is not shown that the public believed the recantation without evidence of the persons to whom it did apply. Moreover, the facts as shown in the proof were exaggerated, if not actually false. One important fact

is, that neither in the second published article, nor at any time, nor in any manner, has there been any apology made or regret expressed for the libel, nor any tender made in the record of this process. There is no censorship of the press in this country. But its liberty and power greatly depend on its truthfulness and abstinence from attacks on personal character. The only protection or remedy is, wherever the liberty is abused to the injury of individuals, to give ample damages. The pursuer, as might be expected, has not proved actual ascertained damages; but assuredly such a paragraph was calculated to wound the feelings of any individual, however blunt; nor could it tend to promote the pursuer's character in public estimation. The award now given appears sufficient reparation for the injury inflicted. The defender has ingeniously striven to establish that any decrease of the pursuer's business has arisen either from competition or from atmospheric causes inimical to the pursuer's art. It rested with the pursuer, if he maintained real loss or damage, to prove such, and the defender in this line of evidence appeared as admitting the libel and its application to the pursuer and his claim to have reparation, but only sought to reduce its amount by evidence of other causes contributing to the decrease of his business.

H. B."

On an appeal, and after hearing parties' procurators, the Sheriff (Lee) dismissed the appeal, and affirmed the judgment, adding the following:—

"*Note.*—The pursuer is a photographer in Crieff, and complains of a paragraph in the *Strathern Herald* of date 2nd June last, headed 'Muthill Midnight Brawlers,' and marked 'communicated.' The paragraph refers to certain occurrences as having taken place in Muthill upon a night in that week. It speaks of the time as Tuesday evening and Wednesday morning, but mentions circumstances which appear to have occurred only on the Wednesday night or Thursday morning. It professes to describe a disturbance which took place. The originators of the disturbance are said to have been a number of noisy individuals who had come from a neighbouring town to 'attend a lottery which is at present going on here,' and it refers to certain persons as the more prominent of the brawlers, one of them being described as 'a long-legged, swarthy-complexioned son of Crispin,' and the other as a 'portly knight of the Camera.' The pursuer complains that he is the person referred to under the latter description; but his allegation on record is that 'the evening of Tuesday the 28th of May 1877' was the occasion on which he went to Muthill and attended the lottery. The defence is a denial that the pursuer is the person referred to.

"At the commencement of the proof it appeared from the evidence of the pursuer—(1) that Tuesday was not the 28th, but the 29th of May; (2) that the pursuer was not in Muthill on the Tuesday evening, but on the Wednesday evening, 30th May; (3) that the occurrences supposed to be referred to in the paragraph took place on Wednesday evening. Thereupon the Sheriff-Substitute was moved to allow the record to be amended, and this motion he has ultimately granted, and has disposed of the case on the footing that the record so stood from the commencement of the proof.

"On the merits the Sheriff concurs in the result at which the Sheriff-Substitute has arrived; but it is with some difficulty that he has sustained the procedure. Had there been any statement on the part of the defender to the effect that the proposed alteration of the record on the part of the pursuer involved changes in the defence, or had there appeared from the debate to be any reason to suppose that the alteration changed substantially the aspect of the case as against the defender, he would have held it a necessary consequence of the amendment that the defender should have an opportunity of amending his defences, and that the whole procedure since the service of the petition should be quashed at the pursuer's expense, in order that a new record might be made up.

"It was forcibly urged in the argument for the defender that such an amendment was altogether incompetent, and under the practice which formerly

obtained, there can be no doubt that the only mode of getting over the difficulty created by such a mistake as occurred here was by abandoning the action and bringing a new one. But after hearing parties fully, the Sheriff became satisfied that the proposed amendment was sanctioned by the 24th section of the Sheriff Court Act of 1876. That there was some error in the record in referring to 'Tuesday the 28th of May 1877' should have been apparent to everybody from the beginning, for the 28th of May 1877 was not a Tuesday. That the occasion intended to be referred to was the evening of Wednesday the 30th May ought to have been sooner explained by the pursuer, for the error was suggested by the article complained of. It referred to 'late on Tuesday night and early on Wednesday morning' as the time of the disturbance with which the pursuer thought himself unjustly connected. He must have known that the occurrences to which reference was made, if he was in any way connected with them, took place on Wednesday night, and not on Tuesday night, and he should have made it clear from the first that although the paragraph mentioned Tuesday night, he intended to prove that it truly referred to an occurrence on Wednesday night, and represented him as having taken a discreditable part in it. The difference of a night might in other circumstances have had important consequences in the conduct of the defence. For although it was not suggested that in this case there would have been any ground for such a defence, it might have happened that the defender, though not able to justify an imputation of excess in strong drink upon the Tuesday night, considered himself in a position to state such a defence as applicable to Wednesday night. It is therefore with some hesitation that the Sheriff has allowed the record to be corrected in the summary way permitted by the Sheriff-Substitute, and it is only because the error was to some extent apparent from the first, and because the record is plainly made up on the footing that the occasion referred to was known to both parties, and could be sufficiently identified by the contents of the paragraph complained of.

"Assuming that the record contains a relevant and sufficient allegation that the paragraph in question was of and concerning him as the 'knight of the Camera' therein referred to, the Sheriff is of opinion that it certainly holds him up to ridicule and contempt as having 'imbibed too much strong drink,' and having improperly, and in a disorderly manner, attempted to get more drink by knocking up the landlady of the Black Bull, breaking windows, and other 'uproarious conduct.' It refers to the proceedings in which he is said to have taken a prominent part as 'discreditable conduct,' which had been reported to the authorities, who would no doubt make the parties 'pay for their whistle.'

"The only question, then, seems to be, Is it proved that the article was of and concerning the pursuer? The Sheriff thinks that on this point a verdict must be given for the pursuer. It seems to him to be of little consequence that some people were not certain of the application of it, if it is satisfactorily proved that it was aimed at the pursuer, and that others thought it applied to him. The pursuer was not bound to examine everybody in Crieff.

"But it is said not to have referred to the pursuer, because the anonymous writer has denied the application of it in some communication to the defender, which is not produced, and it was argued that the paragraph to that effect inserted in the *Strathearn Herald* of June 9th was a conclusive answer to the pursuer's case.

"The Sheriff is of opinion that this part of the defence is not entitled to favourable consideration, or to any consideration at all. The publisher of a newspaper which has been used as the organ of such a communication as that complained of by the pursuer may be entitled to withhold the name of the writer, but he can do so only on condition of undertaking responsibility for the article himself. Being thus identified with the writer of the article as regards responsibility, he cannot take much benefit by another anonymous statement by the writer, that the paragraph had no reference to the complainer. He must submit to have that question disposed of upon the evidence, and can

scarcely expect that a court of law will allow it to be decided upon the simple denial of the defender, for that is all that the paragraph of June 9th amounts to. Still less can he expect a court of law to accept as evidence the statement of any one who does not come forward as a witness and submit to cross-examination, but who communicates his denial through the publisher in the same anonymous form in which the alleged slander was issued.

"On the whole, the Sheriff thinks that justice has been done by the Sheriff-Substitute, both in getting at the real question in controversy between the parties, and also in deciding that question against the defender. R. L."

Act.—Mitchell.—Alt.—Soutar.

ABERDEEN SHERIFF COURT.

NOBLE'S SEQUESTRATION.

Bankruptcy—Election of trustee on sequestrated estate—Opposing interests—Act 19 & 20 Vict. c. 79, sect. 72.—The estates of Walter Noble, fisherman, Fraserburgh, were sequestrated by the Sheriff of Aberdeen and Kincardine on the 5th day of October 1877, and a meeting of creditors for election of trustee was held on the 16th day of October. At the meeting two parties were proposed for trustee—James Cruickshank, writer in Fraserburgh, and Dr. Mellis, residing there. Objections were lodged for both parties, and, after hearing parties, the Sheriff-Substitute gave the following decision:—

"Having heard parties' procurators yesterday in the competition for the office of trustee on this sequestrated estate, and having considered the notes of objections, productions, and whole process, and having also seen the process presently pending, *Cruickshank v. Noble*: Finds that, at the meeting held for the election of a trustee, John Mellis and James Cruickshank were respectively proposed for the office of trustee: Finds that, upon the vote being taken, creditors having claims to the amount of £142, 18s. 3d. voted for John Mellis, and creditors having claims to the amount of £192, 4s. 3d. voted for James Cruickshank: But finds that the said James Cruickshank holds an interest opposed to the general interest of the creditors, and that it is therefore not lawful to elect him as trustee: And finds, further, that at the said meeting for election of a trustee the creditors did not fix a sum for which the trustee should find security for his intronisations and for the performance of his duties, and did not decide upon the sufficiency of the caution, none having been offered: Therefore refuses to declare that either of the above-named parties has been elected trustee: Appoints the creditors of the said Walter Noble of new to meet to elect a trustee or trustees in succession: Appoints advertisement of the time and place of holding the said meeting to be made in the *Gazette* by the said John Mellis: Finds no expenses due to or by either competitor, and decerns.

"*Notes.*—The amount of votes recorded for Mr. Cruickshank is £192, 4s. 3d. Of that sum Mr. Cruickshank's own claim amounts to £189, 5s. 8d. Of the latter sum, again, £100 is vouched by a promissory note payable on demand, dated 14th July last, and £75 is vouched by a bill at one day's date, dated 4th August last. The genuineness of these documents is disputed, and no specification is given of what transactions they represent. Their dates, however, taken along with the averments contained in an action which was raised on 15th August last by Mr. Cruickshank against the bankrupt, disclose that (assuming their genuineness) they were granted during the course of certain transactions in fish out of which that action arises. It also appears that for some years past these two parties have been engaged in a joint adventure in fish, in which, at one time at least, there was to be an equal division of profit and loss. How accounts stand between them for previous years, and what

arrangement existed for the present year, are matters which it will be the first duty of the trustee to investigate in the interest of the general body of creditors. As Mr. Cruickshank has thus a large and disputed claim against the bankrupt, and as apparently there must be an accounting between them, I am of opinion that Mr. Cruickshank's interest is such that he cannot be elected to the office of trustee.

"With reference to the other competitor, Dr. Mellis, I find myself unable to declare his election for a different reason, which is of a more technical kind. The 72nd section of the Bankruptcy Act provides that 'the creditors shall, at the meeting for election of a trustee, fix a sum for which the trustee shall find security for his intromissions and performance of the duties and rules hereby enacted, and shall also decide on the sufficiency of the caution offered.' In the present case this provision has not been complied with, the omission apparently having occurred simply from oversight. It was urged on behalf of Dr. Mellis that this circumstance ought not to operate as a barrier to his election as trustee being declared, as the finding of caution was a condition precedent only to *confirmation*. I was therefore asked in the meantime to declare Dr. Mellis elected, and to appoint the creditors to meet, in order to settle the amount and sufficiency of the caution to be found by him. This course appears sensible, but it does not seem to be within the statute, and such authority as there is on the point rather indicates that it would be irregular (*vide Miller*, 17th July 1846). The only step which has to be taken between the declaration of the election and the confirmation is the lodging of the bond of caution. The fixing of its amount, etc., is not merely put into the hands of the creditors, but it is for them to dispose of that matter '*at the meeting for election.*' Until they have complied with this regulation, they are not in a position to come to the Sheriff and ask him judicially to declare the election."

SHERIFF COURT OF ORKNEY.

INTERDICT—CLOUSTON v. CLOUSTON.

Process—Sheriff Court Act of 1876—Are the benefits of summary procedure in summary cases abolished by the Act of 1876?—The note to the Sheriff-Substitute's interlocutor explains the point of interest which leads us to report the case:—

"*Kirkwall, 24th September 1877.*—The Sheriff-Substitute of the counties of Caithness, Orkney, and Shetland, grants warrant to cite the defender by serving upon him a copy of the foregoing petition and of this deliverance upon an induciæ of six days, and ordains the defender, if he intends to show cause why the prayer of the petition should not be granted, to lodge in the hands of the clerk of Court of Kirkwall answers thereto within the induciæ of citation hereon under certification of being held as confessed; meantime grants interim interdict as craved.

JOHN C. MELLIS.

"*Note.*—As the Act of Sederunt of 10th July 1839, section 137, is not repealed, and section 8 of the Sheriff Courts Act of 1876 (sub-section 1) seems to contain a reservation which can preserve the benefit of summary process, the Sheriff-Substitute has ordered answers. The following of the schedule of the last-mentioned Act would in this summary case prevent answers being lodged until the first Court-day after the expiration of the induciæ, a result which surely cannot have been intended. The Sheriff-Substitute has had the opportunity of consulting the Sheriff, and he agrees in these views.

"J. C. M."

SHERIFF COURT OF ZETLAND.

INTERDICT—SPENCES v. LEISK & WALKER.

Sheriff Courts Act's 1853 and 1876—Questions under sec. 15 of former and sec. 49 of the latter.—This summary process was instituted in June 1872 at the instance of

postponed fiars in a *Udal* property against the then fiduciary fiar, and possessor for more than seven years, to prevent him granting a lease of the minerals to the defender Walker. Interdict was granted by the Sheriff-Substitute (Mure) in July 1872, but on appeal the Sheriff (Thoms), in respect of the possession and actings of the respondent Leisk, and more particularly of the doubtful competency of such a destination in *udal subjects* where the title did not require to be in writing, on 19th August 1872, dismissed the petition in order that the questions raised might be tried in the Court of Session, following *Cruikshank v. Irving* (23d Dec. 1854, 17 D. 286).

The case was appealed to the Court of Session, and the Second Division pronounced this judgment :—

“*Edinburgh, 12th March 1873.*—The Lords, having heard counsel upon the appeal; Recall the interlocutor complained of: Find that the complainers have a sufficient title to insist on the prayer of the petition: Refuse the application for interdict *hoc statu*: Appoint the respondent John Walker to pay the rent or lordship of 15s. a ton stipulated in the missives, Nos. 18 of process, as it falls due from time to time to such bank in Lerwick as the Sheriff may appoint, subject to the orders of the Court in this or any competent process: Authorize the Sheriff, on the application of George Thomas Leisk, to direct the accruing bank interest on the sum so consigned to be paid over to him. *Quoad ultra* remit the case to the Sheriff with power to him to carry out the directions of this judgment as he may think just: Find no expenses due to either party, and decern.
J. MONCRIEFF, J.P.D.”

On the case returning to the Sheriff Court under the remit the difficulties arising from the operation of section 15 of the Act of 1853 became at once apparent, and the Sheriff-Clerk, on orders from the Sheriff-Substitute, had the case put to the roll every three months to keep the process alive. In this way nineteen renewals of the process took place, but while thus keeping the process alive the litigants took to dying, leaving the tenant Walker in October 1877 the only survivor. In that month a new pursuer tried to appear, and thereupon the following procedure took place and interlocutors were pronounced :—

“*Lerwick, 10th October 1877.*—The Sheriff-Substitute allows the minute on behalf of Thomas William Leisk Spence, No. 23 of process, craving to be sisted a party pursuer to be seen until next Court day, the minuter intimating the same by sending a certified copy of the minute and of this interlocutor to the defender Walker or his known agent.
ANDREW MURE.”

“*Lerwick, 18th October 1877.*—Having considered the state of this process, together with the two minutes for Thomas William Leisk Spence, and having heard parties, the Sheriff-Substitute sists the said Thomas William Leisk Spence as pursuer of this action in room and place of the original pursuers, and further appoints intimation on the walls of the Court House of the minute of wakening, by affixing a copy thereof on the said walls for seven days, and appoints intimation of said minute to the defenders or their representatives in terms of the statute 39 & 40 Vict. cap. 70, section 49, and in the event of their being furth of Scotland, appoints edictal intimation thereof by publication in the Record of Edictal Citations.
ANDREW MURE.

“*Note.*—The respondent Walker's procurator argued (1) that the minuter must bring an action of transference, and (2) that he must produce a title before being sisted. An action of transference would be the appropriate remedy of the defender if he wished to transfer the action against the minuter. But when the latter desires to become pursuer, his only course is to move that he should be sisted. The second point presents a stronger difficulty. No title is produced; but it is not denied that the minuter is the present fiar of Haaf Granie, and that he is the heir of the pursuer Basil Spence. Under the order of the Court of Session the defender Walker is directed to consign in bank the

royalties of chromate of iron which he may raise in Haaf Grunie under a lease which is still current, and it is alleged royalties have accrued and may still accrue while he has never obtempered the order to lodge these. The interest of the minuter, both as heir to his brother, and now presently interested in securing the fulfilment of the order of the Court of Session, is quite clear.

"By the statute 1693, c. 15, it is enacted that if the pursuer shall happen to decease at any time during the dependence of any process raised at his instance, there shall be no need for his heir, etc., to raise a transference: 'But the said heir is hereby allowed upon production of his service or retour, etc., to insist in the principal cause.' By the Conveyancing Act of 1874, sec. 9, the personal right vests without service in the heir entitled to succeed by his mere survivance. The necessity for production of a service seems obviated.

"The difficulty felt by the Sheriff-Substitute in giving effect to the minute to sist arises from the apparent inconsistency of a new party appearing in a cause which is asleep. But on consideration the Act of 1693 must have often been put into practice more than a year and day after the death of a pursuer, because the *annus deliberandi* allowed to the heir to consider whether he would represent his ancestor must have frequently carried the period of sisting beyond the year and day which sets a process to sleep. Formerly the practice was that libelling upon and producing his service with a summons of wakening, the heir moved the Court in the original cause to sist him and waken the case. Under recent legislation, having expedite his service, he must have applied to be sisted, and combined that with a motion to waken, and such, it is believed, was the practice in the Court of Session. The 49th section of the recent Sheriff Court Act of 1876 introduces a form of wakening previously unknown in the Sheriff Court, which implies writing interlocutors and directing procedure in the interlocutor sheet before the process is even awake. Giving a fair interpretation to that section, and coupling it with the right given by the Act 1693, there seems no objection to the motion to sist a new pursuer combined with a minute of wakening. The practice must have existed, and the necessity for service being now dispensed with, there is no alternative, if effect is to be given to the interlocutor of the Court of Session, but to sist the minuter as a party to the action. But for that interlocutor the Sheriff-Substitute would have held that the pursuer had no interest in following out the possessory conclusions to which the petition is restricted, and he would have refused the present motion. To the mind of the Sheriff-Substitute the process is strangely complicated by the terms of that judgment, but his duty as an Inferior Judge is to endeavour to carry out the directions of the supreme tribunal.

"A. M."

"*Lerwick, 25th October 1877.*—The Sheriff-Substitute, on the motion of defender Walker's procurator, grants leave to appeal against the preceding interlocutor.

"ANDREW MURE."

"*Lerwick, 25th October 1877.*—The defender Walker appeals to the Sheriff.

"J. KIRKLAND GALLOWAY."

"*Lerwick, 5th November 1877.*—The Sheriff orders the appellant to lodge a reclaiming petition within eight days of the date of this interlocutor, and the respondent answers to said petition within eight days after the petition is lodged.

"GEO. H. THOMAS."

"*Lerwick, 3d December 1877.*—The Sheriff, having considered the appeal of the defender Walker, with his reclaiming petition, and answers thereto by the minuter Thomas William Leisk Spence, and whole process, sustains said appeal, and recalls the interlocutor submitted to review: Allows the minuter to amend his minute, No. 23 of process, by stating the date of the death of each of the whole pursuers, and of the defender and respondent, and on the minuter's doing this allows him to appear and support, on the title he alleges, the motion he makes to waken this process of interdict against his deceased uncle, who was (if such a holding be competent in udal subjects) fiduciary fiar of the island, and

which the process relates : And remits the process, that such hearing may take place, and the points emerging be discussed of, and the case proceeded with as accords : Reserving meantime all questions of expenses. One word delete.

GEO. H. THOMAS.

"*Note*.—This action, with its nineteen renewals of a formal order to keep it alive, illustrates the operation of the 15th section of the Act of 1853, which has now been repealed by section 48 of the Act of 1876. Section 49 of the last-mentioned Act has a reference to the repealed section, and declares that its procedure 'may be applied to any action where a less period than six months had, at the commencement of this Act (1st Oct. 1876), elapsed without any proceeding having been taken therein.' Here the last proceeding in 1876 was the interlocutor of 26th July 1876, and thus the benefits of said section 49 may be claimed. But the minuter's motion in this action of interdict which was raised at the instance of his mother, with consent of his father and elder brother as the postponed fiars of the Island of Haaf Grunie, against, not merely the surviving defender John Walker, but George Thomas Leisk, his uncle, the fiduciary fiar, is based on the statement that the minuter is now fiar of the island. Further, the motion made by this present fiar is to be sisted as pursuer, for the purpose, of course, of getting the prayer of the petition granted, as the pursuers have been held entitled to do by the Court of Session, which is interdict against his deceased uncle, in whose room and place as fiar the minuter would seem also to stand. This is a possibility which the Sheriff-Substitute has not noticed, and which makes the present case so peculiar that the Sheriff can only see his way to allowing the minuter to appear to be heard so as to have the very peculiar position of this case thoroughly discussed. This course seems to be sanctioned by *Flowerden* (Meldrum's executor) v. *Crichton's Trustees* (10th Feb. 1849, 11 D. 563), which further shows that a much more limited sisting may be granted than that craved and allowed by the interlocutor which has been recalled.

"The Sheriff has assumed that all the predeceasing parties have died since the last renewed order on 26th July 1876, as the dates of the several deaths of "the whole of the pursuers" are not specified. He has, however, ordered the amendment of the minute in this respect, and also as regards the insertion of the date of the death of George Thomas Leisk, in case further complications of these dates may arise.

G. H. T."

Act.—Sievewright.—Alt.—Galloway.

BANFF SMALL DEBT COURT.

Sheriff SCOTT-MONCRIEFF.

GORDON DUFF v. GREAT NORTH OF SCOTLAND RAILWAY COMPANY.

Reparation—Special Agreement—Railway—Railways Clauses Consolidation (Scotland) Act, 8 & 9 Vict. c. 33 sec. 60.—In this case the Sheriff-Substitute pronounced the following judgment :—

"This is an action at the instance of a proprietor through whose lands the defenders' line of railway runs, and he claims damages for the loss of two lambs alleged to have been killed by the defenders' trains.

"It has been proved beyond all doubt that these lambs were so killed while straying on the line. Nor do I think that it can be reasonably doubted that the lambs got upon the line by making their way through the fence between the pursuer's ground and defenders' line. On the other hand it would appear that this fence had not fallen into bad order, but had, on the contrary, been recently strengthened. Now, railway companies have the statutory duty imposed upon them of erecting fences sufficient to prevent the cattle of owners whose lands border upon the railway line from straying : I must read the word 'cattle' as embracing lambs, animals of considerable value, and kept within enclosed ground. If a fence proves insufficient, it has, I think, been decided

that it matters not whether the insufficiency is inherent in the nature of the fence or is the result of neglect, the company being bound at any time to render it sufficient, appears to me to be the import of the case of *Brown v. The Edinburgh and Glasgow Railway Company* (March 15, 1864, 2 Macph. 875), in which it was held that 'a landowner was not precluded from demanding that a fence originally constructed of insufficient height should be made sufficient by the fact that it had stood for more than two years' (the statutory period after which the power to compel the company to erect fences ceased), and that the railway company could still be compelled to make it sufficient for the purpose for which it was intended.

"The fence in this present case has stood for a number of years, nor can it be said to be in bad order. But it is obviously insufficient for the purpose of keeping lambs from straying. One of the defenders' servants in his evidence stated that he has assisted in putting lambs back through its wires into the field.

"But it is argued for the defenders that the pursuer is precluded from objecting to the sufficiency of their fencing by the terms of a special agreement entered into by him with them at the time when their line of railway was about to be formed. By that agreement the defenders were taken bound to erect along that portion of the line which intersects the pursuer's policies a neat wire fencing similar to that erected upon what I assume was a portion of their line then completed, and it is not disputed that this has been done.

"But although the terms of this agreement might prevent the pursuer from now insisting upon the erection of a stone wall instead of a wire fence, or even upon substitution of a wire fence of, it might be, a more elaborate and expensive description, can it be said that he is barred from demanding that the fence which has been erected shall be at least sufficient for the purpose which the statute contemplates? I think not, seeing that the pursuer in stipulating for a fence was surely entitled to assume that the fence would be sufficient for that purpose. A special clause excluding the pursuer from making any complaint as to the sufficiency of the fencing would, it appears to me, have been necessary before the defenders could urge their present contentions.

"If, therefore, the pursuer has still the right to insist upon the defenders maintaining a sufficient fence, it follows that he can claim damages arising for loss to him out of the insufficiency of the fencing; and therefore I must decide this case in favour of the pursuer, and assess the damages at £3, 10s., being 35s. per lamb."

Act.—Soutar.—Alt.—Watt.

INVERNESS SHERIFF COURT.

BELL & SON V. MACBETH.

The pursuers have their place of business in Argyle Street, Glasgow, and the defender, John Macbeth, is a butcher in Fort-William. The action was raised in the Inverness Sheriff Court, and the first stages of the case went on in the ordinary way. A defence was stated for Macbeth, and there was also a commission granted to examine witnesses elsewhere. At a subsequent stage, however, Macbeth withdrew the defence stated, objected to the case being carried on in the Inverness Sheriff Court, and contended that it should be gone on with in the Court at Fort-William. Sheriff Blair, before deciding the question, asked Macbeth to state his defence on its merits, but this Macbeth declined to do. Thereupon Sheriff Blair issued an interlocutor in favour of the pursuers, finding that the Court had jurisdiction. The defender appealed, and Sheriff Ivory has now issued an interlocutor recalling his Substitute's decision in regard to the question of jurisdiction. As the case is an important one, we give both interlocutors. Sheriff Blair's decision is as follows:—

"*Inverness, 15th November 1877.*—The Sheriff-Substitute having heard parties' procurators: Allows the defences formerly stated to be withdrawn:

Recalls the commission already granted: Repels the plea of no jurisdiction now pleaded by the defender: and, in respect that the defender declines to state any defence on the merits, Finds the defender, the said John Macbeth, liable to the pursuer in the sum of £13, 11s. 6d, with the sum of £1, 15s. 9d. of expenses, and decerns.

PATRICK BLAIR.

Note.—On the motion of the defender's agent, the defence stated on the 7th inst. was allowed to be withdrawn. Thereafter the defender pleaded 'no jurisdiction,' in respect that under the Debts Recovery (Scotland) Act, 1867, he could only be cited to the court of the district in which he resided, and he declined to state any defence on the merits.

"This point has already been decided in the case of *Stewart v. McGregor & Sons* (23rd September 1868, 40 Jurist 654, 1 Couper 92); but for the benefit of the defender and his advisers I shall quote the opinion of Lord Deas on the subject: 'the point raised is an important one, but I do not entertain any doubt with regard to it. It has been said that the object of the Small Debt Act in instituting Circuit Courts was that defenders might have justice brought to their doors. But the Act was intended to benefit pursuers as much as defenders. The true construction of the 26th section of the Small Debt Act, 1873, is that there is an alternative given of bringing any action before the ordinary Small Debt Court, whose jurisdiction extends over the whole county, or before the Circuit Small Debt Court within the district of which the defender resides, or to which he is amenable. There is nothing in the words of any part of the Act to make a different construction necessary, and the provisions of the sections 23, 24, and 25, without referring to them in detail, clearly show that this was intended. *The jurisdiction which was in the Court of the county town before the Act remains, and was intended to remain, in it.* The purpose of the Act was to give additional facilities in small debt cases, and not in any way to restrain or limit the jurisdiction of the Sheriff over the whole county.

"I may also refer to the note of Mr. Sheriff-Depute Bell for his reasons in repelling this plea, as it was referred to with approval by the Lord Justice-Clerk in giving judgment on the appeal.

"Again, though these sections of the Small Debts Act (secs. 23-26) are incorporated by section 5 of the Debts Recovery Act, except in so far as inconsistent with the provisions of that Act, section 27 of the Small Debt Act is not. But assuming that the Sheriff may adjourn cases to any of the other Small Debt Courts where the ends of justice and the convenience of the parties require it, how is it possible for him to determine that the ends of justice require it or not when the defender positively refuses to state a defence on the merits? If the defender has no defence, or has, for example, a defence which requires the proof to take place in Glasgow, where lies the injustice or the inconvenience in hearing the case in the Court of the county town? On the other hand, if the case is a difficult one, and there is only one law agent in Fort-William, who is engaged by the defender, would the ends of justice not require that the case should be heard here? But whether the defence to this action be good or bad the Court has no means of knowing, since the defender refuses to state one. A pursuer cannot compel a party to appear, but in all cases where a defender enters appearance, but does not abide by it by lodging or stating defences, the pursuer has the remedy of a decree, which proceeds upon the ground that the defender, after due warning, having failed to appear and state defences, is to be presumed to have none to state. That he should have stated a defence if he had one at the time he proposed the declinature of the Court's jurisdiction, I think, admits of no doubt. He cannot say he was afraid to engage in a discussion of the merits lest by doing so he would be held to have passed from his declinature if that declinature were repelled, as this very point was also decided nearly two centuries ago. (See *Shaw v. Buchanan*, 29th July 1696, Fountainhall, vol. i., p. 730; Mor. 7314.)

"In these circumstances I have no alternative but to repel the plea of no jurisdiction and give judgment in favour of the pursuers, with costs. P. B."

The defender appealed against the above interlocutor, and Sheriff Ivory has just issued the following note :—

"10th December 1877.—The Sheriff having considered the defender's appeal and whole process, affirms the interlocutor appealed against in so far as it allows the defence formerly stated to be withdrawn, and recalls the commission already granted. *Quoad ultra*, recalls the said interlocutor, and remits the cause to the Sheriff-Substitute of the Fort-William District of Inverness-shire to proceed further therewith as shall be just. W. IVORY.

"*Note*.—In the county of Inverness the Sheriff Court is divided into four districts, and a Sheriff-Substitute is appointed for each. This has been done for the convenience of litigants in consequence of the great extent of the county, and the hardships of forcing parties to appear before the Court at Inverness who are resident in islands and districts at a great distance from the county town. Hitherto it has been the practice of each Court to confine itself to the disposal of the civil business connected with the particular district assigned to it. In one or two instances cases connected with the other districts have been disposed of at the ordinary Court held in Inverness, but in these the pursuer was required to show strong grounds for departing from the usual course. Where the pursuer failed to establish such grounds the cases were remitted from the Inverness Court to the county Court of the district to which they properly belonged.

"The present action is raised by the pursuers in the ordinary Debts Recovery Court of the Inverness district against the defender, who resides in Fort-William, for goods supplied, amounting to £13, 11s. 6d. The defender says that he is too poor to employ an agent, and that if the case had been brought in Fort-William he would have defended it there himself. In consequence, however, of the action being raised in Inverness he was put to the expense of employing an agent, and the latter appeared at the first calling of the case, and moved that it be remitted to Fort-William.

"The pursuers opposed this motion on the ground that there was no agent in Fort-William to attend to the case on their behalf.

"It appears, however, from the correspondence produced in process that Mr. Macniven, who is unfortunately the only procurator of court in Fort-William, was, at the date when the action was raised, quite free to act as the pursuer's agent. It further appears that he is still in a position to do so, as the defender does not intend to employ an agent in the Fort-William Court, but wishes to appear there and state his own case.

"In these circumstances it appears to the Sheriff that the pursuers have failed to establish any good grounds for bringing their action in the Inverness Court, and that the case therefore should now be remitted to the Fort-William Court, to which it properly belongs.

"The plea of no jurisdiction was not stated by the defender until the third calling of the case, and the Sheriff has not considered it necessary to dispose of it. He thinks it right to observe, however, that the case of *Stewart* (1 Couper, 92) does not, in his opinion, decide the question regarding jurisdiction raised in the present case. In *Stewart's* case it was held that in Banffshire—a county where there is only one Sheriff Court and one Sheriff-Substitute—the latter might decide in his ordinary Court at Banff small debt and debts recovery cases in which the defenders reside within the jurisdiction of Small Debt Circuit Courts in his district. But it was not held that in a county like Inverness-shire, where there are four separate districts, with a Sheriff-Substitute and an ordinary Small Debt Court attached to each, the Sheriff-Substitute resident in the county town might competently decide all small debt and debts recovery cases from the other three districts that were brought before him.

"The practice in Inverness-shire has hitherto been for the Sheriff-Substitute of each district to dispose of all small debt and debts recovery cases arising within his district; and further to decide in his ordinary Court all cases of the above kind brought before him there, whether the defenders resided within the

jurisdiction of his Small Debt Circuit Court or not. This practice seems to be in accordance with the decision in Stewart's case and the provisions of the Small Debt and Debts Recovery Acts, and is attended with great convenience to the parties. But if, instead of this, pursuers are to be allowed to bring all small debt and debts recovery actions pertaining to the districts of Fort-William, Skye, and Lochmaddy, into the ordinary Small Debt Court of the Inverness district, and to drag before that Court defenders from the distant Hebrides and other remote places in Inverness-shire, it would, in the Sheriff's opinion, be highly detrimental to the ends of justice, and would render the Courts of the other three districts comparatively useless.

"Further, there is only one ordinary Court referred to in the 26th section of the Small Debt Act. That section provides 'that all causes shall be brought before the ordinary Small Debt Court or any Circuit Small Debt Court, within the jurisdiction of which the defender shall reside, or to the jurisdiction of which he shall be amenable.' Now if, as contended by the pursuers, the ordinary Small Debt Court of the Inverness district is the ordinary Court here referred to, then 'all causes' from Fort-William, Skye, or Lochmaddy, must be brought either in the Circuit Courts in these districts, or in the Inverness Small Debt Court, and no such causes can legally be brought in the ordinary Small Debt Courts of the other three districts. It seems clear that this cannot be the proper construction of the 26th section. The true construction seems to be that hitherto adopted in Inverness-shire, viz., that in a county where there are two or more districts the ordinary Court referred to in the 26th section is the ordinary Court of the district, and not that of the county town.

"W. I."

Act.—Macdonald.—Alt.—Colvin.

Notes of English, American, and Colonial Cases.

AUCTION.—*Liability of auctioneer to purchaser for non-delivery—Conditions of sale—Failure of purchaser to apply for delivery within the time—Condition precedent.*—Defendants, auctioneers, held a sale on the premises of a railway company, which was described as being of unclaimed property "by order of the directors." The conditions of sale contained these words—"The lots to lie at the purchaser's risk from time of sale, and to be cleared away within three days after the sale at the purchaser's expense with all faults and defects. If from any cause the auctioneer shall be unable to deliver any lot, then in such case the purchaser shall accept compensation calculated, etc. Upon failure of complying with the above conditions, all lots uncleared within the time aforesaid shall be resold." Plaintiff bought one lot, but did not apply for delivery until the fourth day after the sale, when it was not forthcoming, and defendants said it had been delivered to some one else. There was evidence that it had been seen on a trolley as if for delivery on the morning of the third day. In an action for non-delivery against the auctioneers,—*Held*, that auctioneers not being in the position of ordinary agents, there was on the above facts evidence for the jury of a personal contract by defendants to deliver; and if they were liable to be sued, then, not having exercised the power of resale, they were not absolved from the necessity of delivering the goods by reason of the breach by plaintiff of the condition as to clearing within three days, that not being a condition precedent to his right to claim delivery, as it did not go to the whole root of the consideration.—*Woolf v. Horne*, 46. L. J. Rep. Q. B. 534.

FOREIGN GOVERNMENT.—*Action to enforce bond against property of Government in hands of English agent.*—The bond of a foreign Government creates nothing but a debt of honour, and the promise contained in it cannot be enforced in

the Courts of this country against English agents of the Government who have funds belonging to it in their hands, even though the Government, after notice of an action by the bondholder against the agents, makes no claim to the funds. If such an action against the agent could be maintained, it would amount to an assumption of a jurisdiction over the foreign Government. As the foreign Government cannot be sued in the Courts of this country, neither can its agents be sued in the absence of the principals.—*Twycross v. Dreyfus* (App.), 46 L. J. Rep. Ch. 510.

INSURANCE AGAINST FIRE.—*Wharfinger and merchant both insuring—Contribution—Subrogation.*—It appearing that by usage and implied contract in the grain trade of London, the wharfinger is liable to the merchant for any loss by fire on grain stowed in his granaries,—*Held*, that if both merchant and wharfinger insure, the merchant's insurers cannot be called upon to contribute to the wharfinger's insurers in respect of any loss by fire, but can call upon the wharfinger's insurers, or, if necessary the wharfinger himself, to recoup them anything they may be required to pay the merchant.—*North British and Mercantile Insur. Co. v. London, Liverpool, and Globe Insur. Co.* (App.), 46 L. J. Rep. Ch. 537.

The only effect of a provision in the wharfinger's policies cutting down the liability thereon to a proportionate contribution in the event of any insurance being effected by the merchant, would be to leave the wharfinger unprotected *pro tanto*.—*Ibid*.

Semble, a condition providing that "if at the time of any loss or damage by fire happening to any property thereby insured, there be any other subsisting insurance or insurances, whether effected by the insured or by any other person, covering the same property, the company shall not be liable to pay or contribute more than its rateable proportion of such loss or damage," has not such a construction or effect.—*Ibid*.

LANDLORD AND TENANT.—*Furnished house hired for season—Defective drains—Implied condition or warranty—Right of tenant to rescind agreement.*—In an agreement for the hire of a furnished house, to be occupied from a certain date during a definite period, there is an implied condition or warranty on the part of the landlord that the premises are reasonably fit for habitation. If they are unfit at the commencement of the term, the tenant does not obtain that for which he contracted, and is therefore entitled to rescind the agreement.—*Wilson v. Finch-Hatton*, 46 L. J. Rep. Exch. 489.

LICENSING ACTS.—*Closing licensed premises—Independent trade carried on in licensed premises—Premises not kept open for the sale of intoxicating liquors.*—The appellant, a grocer and draper, being licensed to sell wines and spirits by retail, not to be consumed on the premises, was charged "for that he did keep open certain premises for the sale of intoxicating liquors" after ten o'clock at night. The appellant had but one shop for his general trade, but the wines and spirits were kept in a large case, which after ten o'clock was closed by shutters and locked; upon the case and in the window were hung notices that, in accordance with the new Licensing Act, wines and spirits could not be supplied after ten o'clock at night. The shop itself was open after ten o'clock, but there was no proof of any sale or exposure of intoxicating liquors. The Justices held the charge proved under section 9 of 37 & 38 Vict. c. 49, and convicted the appellant:—*Held*, that the conviction was wrong; that before the Justices could convict upon this information they must be satisfied that the premises were opened or kept open for the sale of intoxicating liquors.—*Tassell v. Ovenden*, 46 L. J. Rep. M. C. 228.

NEGLIGENCE.—*Master and servant—Contractor—Dangerous employment—Notice of risk—Railway company.*—Defendants employed a contractor to do certain work upon a side wall of a tunnel at a point where the line was on a curve, so that workmen could not see a train approaching till it was within twenty or thirty yards of them. The space between the rail and the wall was just sufficient for a workman to keep clear of a train if sensible of its approach

Trains passed the spot every ten minutes, and when a train passed on the further line the noise would prevent a workman from hearing the approach of a train upon the line nearest to him. There was no light at the spot in question; no one was stationed to give notice of an approaching train, nor was the speed of trains slackened on approaching the spot, nor was any signal given by whistling or otherwise. The plaintiff was a workman in the service of the contractor so employed, and had been working in the tunnel, though not at precisely the same spot, for a fortnight, when he was struck by a train while reaching across the rails to find a tool which he had laid upon the ground. The jury found that there was negligence on the part of the company in not providing a look-out man or altering the usual mode of conduct in the traffic:—*Held*, that the plaintiff having continued the work, with full knowledge of its dangerous nature, had no remedy against the company.—*Woodley v. Metropolitan Railway Co.* (App.), 46 L. J. Rep. Exch. 521.

DEBTOR AND CREDITOR.—*Resolution for a composition—Omission from debtor's statement of a contingent debt—Creditor not barred by composition.*—Plaintiff entered into a bail-bond jointly with another on behalf of defendant, who thereupon became conditionally liable to indemnify them. Defendant having become insolvent, resolutions were passed by which his creditors accepted a composition. Plaintiff, who was a creditor of defendant for debts not connected with the bail-bond, proved for and received a composition on those debts, but his contingent liability on the bail-bond was not inserted in the debtor's statement, and no dividend was received on it. Plaintiff afterwards became liable under the bail-bond, and he sued defendant in order to recover what he was thus compelled to pay:—*Held*, by the Common Pleas Division, that he could not recover, as defendant was discharged from all liability by the acceptance by plaintiff of the composition. But held by the Court of Appeal, reversing this judgment (BRETT, L.J., *dissentiente*), that plaintiff was not bound by the composition proceedings in respect of the contingent debt, and that he could recover what he had paid under the bail-bond.—*Wilson v. Breslau* (App.), 46 L. J. Rep. C. P. 593.

DISSOLUTION OF MARRIAGE.—*Suit by wife—Counter-charges by respondent—Res Judicata.*—To the wife's petition for dissolution of marriage, the respondent answered, denying the charges alleged against him, and making counter-charges of adultery against the petitioner. It was alleged by the petitioner that the counter-charges were substantially the same as those which were made against her in a previous suit in which her husband was the petitioner, and which were negatived by the verdict of the jury, and in these circumstances the Court was moved on her behalf to order that the counter-charges be struck out of the respondent's answer. The Court refused to make the order, holding that the proper mode of raising the question of the alleged estoppel was by replication.—*Robinson v. Robinson*, 46 L. J. Rep. P. D. & A. 47.

DONATIO MORTIS CAUSA.—*Gift of Cheques Payable to Order—Not presented in drawer's lifetime.*—Testator being resident at St. Remo, in Italy, in his last illness drew his cheques on his London bankers, payable to order, and gave them to his wife, who endorsed them to her bankers at St. Remo, and paid them into their bank. The cheques were not presented for payment in London till after testator's death:—*Held*, that the cheques were good *donationes mortis causa*, and that the widow was entitled to the proceeds out of the testator's estate.—*Rolls v. Pearce*, 46 L. J. Rep. Ch. 791.

ELECTION.—*Double Portions.*—A father covenanted to leave three-eighths of his property in settlement on one of his two daughters. By his will he settled half his residue on her:—*Held*, that notwithstanding differences in the trusts under the two instruments, only one portion was intended, and the beneficiaries were put to their election which instrument they would take under.—*Russell v. Aubyn*, 46 L. J. Rep. Ch. 641.

GAMING.—*Money in hands of stakeholder*—*When recoverable*.—The deposit of a sum of money by two persons in the hands of a third, to abide the event of a lawful game between the two, is a wager, and not “a subscription or contribution to a prize” within 8 & 9 Vict. c. 109. sec. 18, and such a deposit may be recovered by the depositor from the stakeholder, if demanded, before it is paid over to the winner.—*Batty v. Marriott* (17 L. J. Rep. C. P. 215) overruled.—*Diggle v. Higgs* (App.), 46 L. J. Rep. Ch. 721.

MARINE INSURANCE.—*Partial loss*—*Cost of repairs to ship*—*Measure of damages*—*Liability of underwriter*.—Plaintiff, who was owner of a ship called the *Crimea*, effected a policy for £1200 with the defendants on his vessel, valued at £2600, against the usual sea risks, on an out and home voyage from C. to L. The policy contained the usual suing and labouring clause. During the voyage the ship sustained damage at sea, the cost of which, after the usual allowance of one-third new for old, together with certain particular average charges covered by the policy, amounted to the sum of £3178, 11s. 7d. The plaintiff had, in addition to this expenditure, to pay £519 for salvage services and general average expenses. Being an old ship, the effect of these extensive repairs was to make her a very much stronger and better ship than she was before the damage. In an action on the policy the defendants contended that the loss was to be estimated by the depreciation of the ship as a saleable chattel, and not by the costs of the repairs; and also, that in the case of a partial loss the assurer could not be liable for more than a total loss with benefit of salvage:—*Held*, that the measure of damage, where the shipowner elected to repair, was to be ascertained by the cost of the repairs, less a proper deduction on account of having new timber for old, even though the result might be to make the underwriters liable for more than a total loss with benefit of salvage (*Lohre v. Aitchison*, 46 L. J. Rep. Q. B. 715):—*Held* also, that as the damage done was as great as to exhaust the policy, and the assured had refused to abandon, the latter was not entitled to recover under the suing and labouring clause a proportion of the salvage expenses beyond the £1200, the salvage expenses not being employed with any view to the benefit of the underwriters, nor accruing to their benefit.—*Ibid*.

MINE—*Right to Work*—*Lateral Support to Buildings*—*Support to Surface*—*Definition of “Adjacent Lands”*.—The right of an adjoining owner is to have his land supported in its natural state, and that without any reference to the width of the strip of land required for its support in that state.—*The Mayor of Birmingham v. Allen* (App.), 46 L. J. Rep. Ch. 673.

Plaintiffs were owners of land on which they had extensive gas works. Defendants were working mines near plaintiffs' land. The minerals in the intervening land had been worked out many years ago. Plaintiffs brought their action against defendants to restrain them from continuing to work their materials, on the ground that their so doing would seriously injure plaintiffs' buildings. The evidence showed that plaintiffs' buildings would be damaged, but it also showed that if the minerals in the intervening land had not been worked out defendants might safely have continued their workings up to the edge of their own boundary:—*Held* (affirming the decision of the MASTER OF THE ROLLS), that the lands of the defendants, not being required for the support of plaintiffs' land in its natural state, were not adjacent lands so as to give plaintiffs a right to support for their buildings from defendants; and that defendants could not by the action of the intervening owner be deprived of their right to take all the minerals under their own land.—*Ibid*.

THE JOURNAL OF JURISPRUDENCE.

THE PRISONS (SCOTLAND) ACT, 1877,

40 AND 41 VICT. CAP. 53.

WE have for some time been considering, in the pages of this journal, the history and condition of the prisons in Scotland, as they existed in early days, and down to the first quarter of this century. During the last session of Parliament there has been passed an Act, which puts the support and management of prisons in this country on an entirely new footing, and introduces many changes in the constitution of the governing bodies. It may not be uninteresting, then, to consider in some detail the provisions of this new Act, but before doing so it will be necessary, for the better understanding of the changes brought about, to notice, very briefly, the position which Scottish prisons at present occupy as established by statutory enactment. The principal Act by which prisons have been for some time regulated is that of 1860 (23 and 24 Vict. cap. 105). Its chief provisions related to the election of county boards, to be chosen by the commissioners of supply for each county, which boards were to have the management and superintendence of the prisons in its district; the Act also made regulations for the visiting of, and discipline in, prisons. It was amended, first by 28 and 29 Vict. cap. 84, and again by 32 and 33 Vict. cap. 35, but we need not allude more particularly to those Acts at present. The present Act repeals, *in toto*, these statutes, except sections 72 and 75 in that of 1860, which deal with certain matters of discipline to which we shall afterwards allude, and substitutes for their provisions an entirely new machinery, the chief features of which we shall now shortly bring before the notice of our readers.

This Act received the Royal Assent on 14th August 1877, and is to come into operation on the somewhat ominous day of the 1st of April 1878. It is divided into two parts, the first (secs. 4-16) treating of the transfer of the prisons to the new governing body, and their general administration, the second (secs. 17-72) being devoted to supplemental provisions, which deal with many questions of detail,

in reference to maintenance of prisons, the treatment of prisoners, and a variety of miscellaneous matters. The constitution of District Boards of Lunacy is put on a different footing than it was by 20 and 21 Vict. cap. 71, and powers are given to commissioners of supply to contribute to reformatories and industrial schools.

PART I.

TRANSFER AND ADMINISTRATION OF PRISONS.

(1) TRANSFER OF PRISONS.

From the commencement of the Act on the 1st of April 1878, all expenses connected with prisons in Scotland are to be defrayed by Parliament (sec. 4) and not by the different counties and burghs as heretofore (sec. 17), and all the prisons are to be transferred to the Home Secretary, who is also to have full power over them as to management and jurisdiction (sec. 5). The rules issued by the Secretary of State for the conduct of prisons are still to continue, so far as they are not inconsistent with the provisions of the Act; these rules may be altered, or new ones added, as may be found expedient, and a copy of the rules for the time being in force is to be hung in some conspicuous place in every prison (sec. 6).

(2) ADMINISTRATION OF PRISONS.

(a) *Prison Commissioners.*

The 7th section contains the most important of all the changes introduced by the Act; by it the present prison authorities are entirely abrogated, and a certain body is constituted, to be called "The Prison Commissioners for Scotland." These commissioners are appointed for the purpose of "aiding the Secretary of State in carrying into effect the provisions of this Act relating to Prisons in Scotland," that is to say, they are to have the complete control and management, for all practical purposes, of the Scottish prisons. The body is to consist of five commissioners,—of whom three are to be appointed by the Crown, two with salaries (sec. 9), and one without, while the remaining two are members *ex officio*, viz., the Sheriff of Perthshire and the Crown Agent for Scotland. Practically, this arrangement will amount to the bulk of the work being done by the two salaried commissioners, under the control of an unsalaried majority of the body. Section 10 details the duties of the prison commissioners, who, it is stated, are to have the "general superintendence" of the prisons in Scotland; this superintendence is not, however, to include the power of appointing the governors, matrons, medical officers, and chaplains of prisons, this being left in the hands of the Government, as is also the appointment of inspectors of prisons; incidentally it is provided that the medical officer must be a duly registered practitioner, and the chaplain must be a minister or licentiate of the Church of Scotland. The commissioners

are to appoint all other prison officials, and are empowered to enter into contracts, and generally to do everything necessary for the maintenance of the prisons and prisoners. In order to do this in an effectual manner, they are, by themselves or *their officers*, to visit the prisons, and make all necessary inquiries and regulations regarding their maintenance and discipline. Besides these general powers, the commissioners themselves, or any one or more of them, may exercise all power and jurisdiction which belonged to the *quondam* "prison authority" of a prison. In this section it is five times mentioned that in all their actings the commissioners are to be under the control of the Secretary of State. When that official requires it, they are to make a report as to the prisons and persons under their jurisdiction, and it would seem (sec. 11) that an annual report is, as a matter of course, to be laid before both Houses of Parliament, containing expressly information and statistics regarding the industries and manufacturing processes carried on in the various prisons (sec. 12); besides this report, a yearly return is to be made of the punishments inflicted within each prison, and the offences for which they were inflicted.

(b) *Visiting Committee.*

Each prison is to have what is called a visiting committee attached to it (sec. 14): the number of members is to be fixed by the Secretary of State, having regard to the local features of each case; and the committee is to consist of as many commissioners of supply or justices of the peace, and magistrates of burghs elected by their respective bodies, as may be prescribed by the Secretary of State. The duties of this visiting committee would seem to be to report to the Home Secretary on any matter regarding the repair, discipline, or the like, of the prison to which they are appointed. Having access, individually and as a body, at all times to every part of the prison and to every prisoner, the committee are thus enabled to detect and report on abuses or disrepair which might escape the notice of the commissioners or their inspectors, or on any matter which might call for rapid action and speedy interference. Besides the members of the visiting committee, any sheriff or justice of the peace, in whose jurisdiction the prison is situated, or having jurisdiction in the place where the offence in respect of which any prisoner confined in the prison may have been committed, is entitled to visit the prison and prisoners. Such visitor may enter in a book, to be kept by the governor, any remarks he may wish to make, and the governor is to direct the attention of the visiting committee to them at their next visit (sec. 16).

The 16th section of the Act concludes the first and shortest, though the most important, of the two parts into which it is divided. We have now been told that the prisons are to be transferred to Government, and of the constitution and general duties of the bodies called respectively the Prison Commissioners and the Visiting

Committee. The second part of the statute is by far the longest, containing no less than fifty-seven sections. It is divided into a number of sub-heads, treating various matters in detail, and which we will now proceed to discuss as briefly as possible.

PART II.

SUPPLEMENTAL PROVISIONS.

(a) *As to Obligation to maintain Prisons.*

The obligation of any prison authority to maintain their prison is, as we have previously seen, to cease (sec. 17); and any prison authority which has either no prison accommodation of its own, or insufficient accommodation, is to pay to Government £120 for each prisoner for whom cell accommodation has not been provided at the time of the commencement of the Act (sec. 18). But if the prison authority so liable has contributed to the erection of a prison by another prison authority, the sum so paid will be taken into account in estimating the amount payable to Government. The 19th section deals with various details having reference to the compensation payable by the Government to the various prison authorities in respect of cell accommodation provided for prisoners. Thus, if one authority has got more cells than are requisite for the accommodation of its own prisoners, and it has contracted with another authority to receive its prisoners, the former, called in the Act the *receiving* authority, is to be entitled to any loss it may have sustained on the contract, up to £120 for each cell. Again, if a prison authority has built more cells than are required for the average maximum number of prisoners maintained in the prison for the five years previous to 1st January 1877, it shall be entitled, except under certain circumstances, which are mentioned, to compensation at the rate of £120 for each surplus cell. The arithmetical process for finding the "average maximum" number of prisoners is carefully given, and a few explanatory sentences conclude this (19th) section. The next clause provides for the case of a prison authority possessing a prison one half of which is not "satisfactory to the Secretary of State." In such a case the prison authority may erect new buildings, which, on their completion, will vest in the Secretary of State, or, if it seems preferable, the authority may arrange to make a money payment instead of building. The remaining portions of this section are occupied with details for the better carrying out of such arrangements, into which it is not here necessary to go minutely.

(b) *As to Contracts and Debts.*

(c) *As to Assets.*

The above two divisions of the Act comprise secs. 22-26 inclusive; though necessary, it cannot be said that they are interesting clauses; in effect they shortly amount to this—that prison authori-

ties are to be liable for all debts which they may have contracted previous to the commencement of the Act; and as to any continuous contract or dealing to be performed partly before and partly after the commencement of the Act, the prison authority shall be liable for so much of it as is performable before the commencement of the Act, and Government for the remainder. As regards the expression "prison authority," as applied to this portion of the Act, it is to be held to mean the commissioners of supply of the county—their obligations being a charge against the general assessment of the county, with a proportionate right of relief against the burghs, etc., within the jurisdiction, as mentioned in the Act. The 26th section provides for the payment of any balance which may be due to any prison authority, having regard to the rights of burghs, etc., as in the previous section.

(d) As to Classification and Commitment of Prisoners.

The Act now leaves the dry details relating to money matters, and treats not so much of prisons as of their inhabitants. An effort is made to abolish the present pernicious custom by which both convicted and untried persons are confined in the same prison. It is provided by sec. 27 that the Secretary of State may appoint a prison in any county or burgh for the reception of persons before and during trial; power is also given him to appoint a convenient prison or prisons in any adjacent county or burgh for the reception of prisoners for "trial, safe custody, punishment, or otherwise." It would appear from this section that, in prisons appointed solely for the confinement of persons before and during trial, only such persons can be confined there as could, if this Act had not passed, have been lawfully confined in a prison situated within the area of the county or burgh in which such prison—or house of detention, as it might have been more suitably called—is situate. If, on the other hand, the Secretary of State appoints a "convenient" prison in an "adjacent" county or burgh for the reception of both tried and untried prisoners, any prisoners, irrespective of the district from which they come, may be committed to such prison. The Secretary of State has also power (sec. 28) to allot particular prisons, either wholly or partially, to particular classes of prisoners. This is doubtless a step in the right direction, as in this way the contamination of younger prisoners by the more habitual criminals can be more easily avoided. When a prisoner, by reason of this power, is confined in a prison beyond the limits of the county or burgh in which he was connected, he is to be sent back to the latter place on his discharge from prison. The 29th section provides for the confinement of civil prisoners; it would seem that they cannot be imprisoned further from the place where they can at present legally be confined than "an adjoining or adjacent" county or burgh. As regards the confinement of prisoners for short periods, it is provided (sec. 30) that in places

where there are police cells, prisoners may be confined in them either before or after trial for any period not exceeding fourteen days. The maintenance of such prisoners is to be defrayed by the State, but the police officials are bound to give both cell accommodation and their own services free, "provided always, the police authorities shall in all cases, and at all times, have a prior claim to the use of such cells, and shall in no case be interfered with in their use thereof." This section may prove of considerable practical use in small towns, where there is not much pressure on the police-cell accommodation; but for large towns the number of police cells is too often miserably inadequate for their ordinary purposes. The provision that the police authorities are to have a prior claim *at all times* to the use of the cells, may prove at times in the highest degree inconvenient, as would be the case of a prisoner who, say on the thirteenth day of his incarceration, had to be removed to a prison, owing to the police cell which he occupied being required by the police authorities. The remaining sections under this head of the Act are the 31st and 32nd; the one provides that the committal of a prisoner to a prison other than that to which he should have been committed shall not render the committal invalid; but any Judge of the High Court of Justiciary may, upon summary application being made to him on behalf of such prisoner, order his removal, at the public expense, to the proper prison; the other section (32) is occupied with a definition of the "legal custody" of a prisoner.

(e) Discharge of Prisoners.

When a prisoner's term of confinement expires on a Sunday, he is to be liberated (sec. 3) on the previous Saturday. It is remarkable that in this clause the term "Lord's day" is used for Sunday, an expression which we do not remember to have often met with in other modern Acts of Parliament. With regard, however, to the system sanctioned by this section, we doubt its expediency. We question very much whether Saturday is a good day on which to turn a prisoner out, free to follow his own devices. In large towns in Scotland it is universally a half-holiday, so that a prisoner who emerges from confinement on that day runs much more chance of falling in with his old associates, and so being led into further crime, than if he had been detained until Monday. On Saturday, also, it is impossible to get work, so that it entails spending two days in utter idleness,—a most dangerous thing for a newly-liberated juvenile offender, more especially if he has in his possession "a sum of money not exceeding two pounds," which may be paid to him by the governor on his dismissal from prison (sec. 35). This money may, however, be placed, not in the prisoner's hands, but in those of a certified Prisoners' Aid Society, on their giving an undertaking to apply the same for the benefit of the prisoner. This course will, we conceive, be the most generally followed, save in exceptional circumstances. A prisoner may be provided with means

to convey him to his home, but even in this case the commissioners need not entrust him with any money, but may accomplish the object "*by causing his fare to be paid by railway, or in any other convenient manner*" (sec. 36).

Prisoners' Aid Societies have been found so productive of good in putting liberated prisoners in the way of earning an honest livelihood, that it is pleasant to find that their usefulness has been acknowledged, and their position improved by the present statute. The Secretary of State has now power (sec. 34), upon satisfying himself as to the good condition of such a Society, to grant it a certificate under his hand, to the effect that it is approved by him for the purposes of this Act. This certificate may, of course, upon due cause shown, be revoked or suspended at any time, but, so long as it remains in force, the Society receiving it shall be deemed to be a "Certified Prisoners' Aid Society."

(To be continued.)

ADEMPTION.

THE recent decision of the Second Division in the case of *Anderson v. Thomson and others*, July 17, 1877 (Sc. L. R. xiv. p. 654), is one that requires grave consideration, not merely of the important legal principles with which it deals, but of the principles of decision which it apparently involves. Briefly stated, its result is this, that in a question whether or not a legacy was adeemed, the Court are prepared to do violence to the admitted intention of a testator, and also to the fundamental principles of the Civil Law, on which it is conceded that the Scotch Law rests, and that in reaching this conclusion they are to some extent influenced by the authority of a case decided last century in the English Court of Chancery. There can be little doubt about the principles of the Roman Law in this matter. In *Anderson v. Thomson* Lord Moncreiff quoted a familiar passage from the Institutes of Justinian (ii. 12-20), from which it appears that neither a subsequent alienation, nor a subsequent hypothecation, of the subject bequeathed was held sufficient to effect ademption. The intention to revoke must be proved. The leading texts in the Digest are as follow: "*Si rem suam testator legaverit, eamque necessitate urgente alienaverit, fideicommissum peti posse, nisi probetur, adimere ei testatorem voluisse, probationem autem mutatæ voluntatis ab heredibus exigendam*" (34. 11, 12). In all cases of necessity, whatever that may mean, the presumption is clearly against ademption. "*Ergo et si nomen quis debitoris exegerit, quod per fideicommissum reliquit, non tamen hoc animo, quasi vellet extinguere fideicommissum, poterit dici, deberi, nisi forte inter hæc interest; hic enim extinguitur ipsa constantia (substantia ?) debiti, ibi res durat, tametsi alienata sit.*" So that even

a purely voluntary conversion of securities by no means concludes the question, though the burden of proof may be transferred from heir to legatee. The text proceeds: "Quum tamen quidam nomen debitoris exegisset, et pro deposito pecuniam habuisset, putavi fideicommissi petitionem superesse, maxime quia non ipse exegerat, sed debitor ultro pecuniam obtulerat, quam offerente ipso non potuit non accipere. Paulatim igitur admitemus etsi ex hac parte pecuniæ rem comparaverit, quam non hoc animo exegit ut fideicommissarium privaret fideicommisso, posse adhuc fideicommissi petitionem superesse" (32. 11, 13). These are the opinions of Ulpian. Paul mentions a special case which is not inconsistent with the general principle: "Quum servus legatus a testatore et alienatur rursus redemptus sit a testatore, non debetur legatario opposita exceptione doli mali: sane, si probet legatarius novam voluntatem testatoris, non summovebitur" (34. 4, 15). No doubt, our stricter law excluding direct parole evidence of intention renders some of these cases slightly inapplicable in Scotch practice, but the ruling principle is to ascertain the true intention by competent methods, and proof of extrinsic facts is always permitted by our law. The case of subsequent donation was of course different from that of alienation, though even here it would seem from Modestinus, lib. viii. *Differentiarum*, that some one had attempted to raise the distinction of necessity. "Rem legatam si testator visus alii donaverit, omnimodo extinguitur legatum; nec distinguimus, utrum propter necessitatem rei familiaris, an mera voluntate donaverit, ut, si necessitate donaverit, legatum debeat, si nuda voluntate non debeat; hæc enim distinctio in donantis munificentiam non cadit, quum nemo in necessitatibus liberalis existat" (34. 4, 18). Even this rule, however, was carried no further than the facts absolutely required; for, as Papinian observes (34. 4, 24. 1), if a father left his daughter gardens with all their stock, and afterwards gave some of the slaves belonging to the garden to his wife, this was a revocation of the legacy only so far as these slaves were concerned. (See this text translated, "Hunter's Roman Law," p. 797.)

The next question is, what is the Scotch law on this point? In *Anderson v. Thomson* Lord Ormisdale refers to three of the leading cases, and Lord Moncreiff "protests, in the name of jurisprudence," against two of them. The first is *Jack v. Lauder*, July 27, 1742, November 11, 357, in which the testator desired that "Bailie Muirhead's £40 bill may be disposed of as follows," that is, among four persons named, who, as well as the residuary legatee, were apparently strangers. Some days after the date of this codicil, he received payment of the bill from the Bailie's widow, and although there were facts before the Court clearly indicating the will of the testator that the legacy should stand, they held that the legacy was adeemed. The report in the Dictionary does not explain why these facts were rejected, some of them being

perfectly admissible evidence of intention: probably the witness was suspected. Apart from these facts, the argument for the legatees was, that "a testator may take payment of a bond or bill without thereby extinguishing the legacy." It was urged, too, that the testator had not exacted, but only received payment when offered to him, "never having done any diligence, or sent messages seeking his money." No authority appears to have been cited to the Court, except the passage above mentioned from the Institutes of Justinian.¹

The second case mentioned was that of *Pagan v. Pagan*, January 26, 1838, 16 Sh. 383, in which the testator directed that a sum of £1000, lent on bond to two persons named, should be held by his trustees in special trust for indemnification of a guarantee which the testator had given; and in the second place, in trust for the children and grandchildren of his brother, subject to apportionment by his brother, and the interest to be paid to his brother for the use of his children. Four years afterwards he added, to the purposes of this special trust, the indemnification of a second guarantee which he had undertaken. Two years before the testator's death the bond was paid by the spontaneous act of the debtor. It was pleaded that, in such circumstances, the Scotch law was fixed in favour of ademption by the cases of *Jack v. Lauder* already mentioned, *Paip*, December 19, 1694, 4 Brown's Suppl. 228, and *Blair*, 5 Brown's Suppl. 718. On the other hand, it was said that the *substance* of the legacy was the £1000, not the bond; and further, that according to two English cases (*Legrice*, Meriv. Rep. 350; *Mann*, 2 Madd. Rep. 223), a legacy of a sum merely described as invested in a particular manner, was not adeemed by a change of investment, especially where that change was occasioned by the spontaneous act of the debtor in the security. Lord Cockburn, with his usual common sense, decided that the legacy was not adeemed. "There is no doubt that the legacy of a specific subject falls by the non-existence, in the testator's life, of that subject." The Scotch cases cited, he says, all proceed on the ground of intention. "Evidence was taken, and held sufficient, to show that a testator intended to revoke, and did revoke, a legacy, not merely by uplifting the money, but by making a new application of it. The author of a settlement, by mentioning a fund out of which, in the circumstances which exist at the date of his deed, he may wish a provision to be paid, does not necessarily make the existence of that precise fund a condition of his gift." Accordingly, in the case of *Legrice*, Sir William Grant held "that the circumstance of its being at that

¹ Lord Elchies' notes on this case mention that (contrary to the opinion of Lord President Forbes) most of the Judges thought a "proof by witnesses" was not a *habile* proof to re-establish a legacy. Surely this depended, not on the character of the evidence as parole or documentary, but on the relevancy of the facts offered for probation.

time out on mortgage was merely accidental. It is descriptive of the present situation of the money." And in *Mann's* case, though the fund failed out of which the legacy was directed to be paid, Sir Thomas Plumer held that "the legacy was not so specific and so connected with the fund as to fail, if there was no such fund." Lord Cockburn further observed that it was still competent for the residuary legatee to show that the discharge of the bond was intended as a revocation of the gift. Unfortunately, this judgment was reversed by Lord President Hope and Lords Gillies, Mackenzie, and Corehouse. Lord Gillies, who delivered the judgment of the Court, says distinctly the legacy is a specific one, which would not have suffered abatement, and which, therefore, is adeemed by the destruction of the subject. He considered that the specific character of the legacy was shown by the special trusts attaching to it, and he adds, "If the legacy was special, it equally came to an end by the extinction of the bond, whether it was paid up by the spontaneous act of the debtor, or in consequence of requisition by the creditor."

The case of *Paip v. Newton* occurred in 1694, and is very shortly reported. The subject of the legacy is described as an "aunt's portion," and though this had been uplifted and spent by the aunt, the commissaries had found that the legatee was entitled, not merely to an equivalent in money, but to a preference. The Lords recalled this judgment, because "uplifting a sum legated is *inter modos adimendi legata*." But they also thought there was equity in the case, and recommended the reporter (i.e. Lord Fountainhall) to endeavour to settle it. The next case was that of *Blair v. Presbytery of Kirkcudbright*, Feb. 9, 1742, in which a testator disposed debts to the amount of 20,000 merks in security of a sum of 15,000 merks which he had mortified for behoof of the poor of 24 parishes. The disposition bore, that if the means and estate disposed should fall short of, or exceed, the sum of 15,000 merks, each parish should suffer diminution or addition accordingly. Having purchased a new estate, the donor gave instructions that the debts should be uplifted, but only a small sum was uplifted. In an action by the Presbytery to recover the amount of the legacy, the Court first found that the order to uplift was not a revocation, and then they found that it was. It was argued that the order was a declaration of intention, and its effect was not interfered with by the delay of the agent to realize, or of the debtor to pay. The case was also put of a reverser consigning a sum of money to redeem a wadsett, in which case the money goes to the heir. Here there was a direction to apply to other purposes. On the other hand, it was pointed out that a charge given on a bond in favour of a husband and his wife, in conjunct fee and liferent, was held not to import a revocation of the wife's liferent. Lord Elchies, however, mentions that he himself and Lord President Forbes did not agree to the last point.

The second modern case, which, along with *Pagan v. Pagan*, has been denounced by Lord Justice-Clerk Moncreiff, is that of

Chalmers v. Chalmers, Nov. 19, 1851, 14 D. 57. Here the truster directed one of four houses to be conveyed to each of his four nephews. One of the houses was required and taken by a railway company, the price was paid into the general account of the truster, on whose death, two months afterwards, the disappointed nephew brought an action for the price, as a *surrogatum* for the house. The Second Division of the Court (Lords Justice-Clerk Hope, Medwyn, Cockburn, and Murray), affirming the judgment of Lord Robertson, held that, as the truster had left no codicil or written instructions indicating his intention that the price should go to his nephew, the latter had no claim to the price as a *surrogatum*. Lord Justice-Clerk Hope said: "There is a broad and marked distinction between the direction to convey to A. B. a certain specific thing, such as a house, on the death of the testator, and the gift of a sum of money, which may happen to be described partly with reference to the security on which it is invested. . . . The presumption is that the mention of the security, unless very special, was only to specify the amount, and the law will presume in favour of the gift of the same, without making it dependent on the security, unless the latter is really and distinctly made a condition of the gift." He then observes, with regard to an averment made in the case that the testator understood the money was to go to his nephew: "Proof of the testator's belief and understanding that the money would go to the pursuer would be quite insufficient, for unless deeds of the testator gave it, it is of no avail that a party believed and understood that such a result would follow." It appears that the only evidence tendered consisted of declarations made by the testator. Lord Medwyn, in his opinion, maintains that the Scotch Law applies to the involuntary sale and conversion of the subject of bequest the same presumption which the Civil Law applied only to the case of voluntary disposal. He also points out that the real evidence of intention is found not in the act of conversion, voluntary or compulsory, or in the fact of eviction from any cause, but in the fact of the testator doing nothing after the destruction of the subject has been brought to his knowledge. Lord Cockburn, who, as we have seen, decided in favour of the legatee in *Pagan v. Pagan*, agreed with the other judges in *Chalmers v. Chalmers*, which he said was not a case of revocation at all, but one purely of specific legacy. Lord Murray also concurred, observing that the case was a hard one, and that he had not the least doubt that the testator intended to give the value of the house.

Such are the Scotch authorities on this subject. We do not refer to a slightly different class of decisions, in which a legacy has been laid by way of obligation on a universal donee, or by way of burden on a particular fund, and the testamentary arrangements have subsequently been altered. But we desire to call attention to the case of *Edmonston* (8th July 1873, M. 13,304), which is thus stated by Erskine (Inst. 3, 9, 10): "Where one, after having be-

queathed a moveable bond, has taken a heritable security for the sum, neither the bond nor its value is due to the legatee; for the alteration of the nature of the debt from moveable to heritable is considered as a tacit revocation of the legacy." It is doubtful whether the case proves this, for the Court merely refused action against the executors for a sum which obviously could not then be confirmed. This explains Mr. Nicolson's note (b) at p. 1000 of his edition, where he says that the Titles to Land Consolidation Act, 1868, sec. 117, has made such a case as *Edmonston* impossible in future. The change in the law can hardly be represented as excluding the inference as regards intention which Erskine drew from the taking of a heritable security, unless this inference was founded on the fact that an obligation to hand over the legacy was placed on the executor and on nobody else. Unless the case of *Edmonston* is treated strictly as one of specific legacy which is destroyed, its doctrine must be questioned. For when the identity of the fund is so well maintained, it would be impossible to infer an intention to revoke. The general law is stated by Professor Bell (Princ. sec. 1886) thus: "Whenever a sum is bequeathed out of a particular fund, or when the expression of the bequest points rather to the amount of the fund than to the designation of it as a specific corpus; or when the bequest plainly refers to the money, not to the security, or to a preconceived intention unconnected with the investment of the money; in such cases the legacy is general, to be made good out of the general fund, although the money should have been uplifted from the investment referred to in the will." In *Anderson v. Thomson* the testatrix in a letter empowered her law-agent to "uplift the deposit-receipt lying with you for £4000, to lodge it in your own name, and to hold it in trust for my mother's brother and sister, and for their children." This money was re-deposited as directed, but shortly afterwards the bulk of it was lent out on heritable security, in name of the testatrix, which security stood at her death. On these facts Lord Gifford held that there had been no intention to revoke on the part of the testatrix, and Lord Justice-Clerk Moncreiff doubted whether the legacy was not a general one of £4000, or at least demonstrative. But both judges held that the Scotch and English cases compelled them to decide in favour of ademption. They do not say that the cases compelled them to decide that the legacy was specific; but this was clearly the basis of their judgment.

The English leading case, to which reference is made in *Anderson v. Thomson*, is *Ashburner v. Macquire* July 18, 1786, 2 Bro. C.C. 106, and 2 White and Tudor, Leading Cases, 267. There a legacy of interest and principal of a bond, and a legacy of "my £1000 East India Stock," were both held to be specific; and Lord Chancellor Thurlow indulges in a good deal of destructive criticism. He rejects the distinction, favoured by Lord Talbot and Lord Hardwicke, between calling up a security and voluntary payment by the

debtor; he rejects the notion of the Civil Law (which, he says, is contrary to common sense), that, after a change in the subject-matter of a specific legacy, a man might declare by his conduct that such a change was no ademption; he rejects the distinction, drawn by Lord Camden and Lord Hardwicke, between a legacy of the "bond by A. B.," and a legacy of "£500 due on bond by A. B. He says that in England, if a debt is bequeathed and paid, the legacy is adeemed. The only question is whether the legacy is taxative (specific) or demonstrative; the *animus adimendi* has nothing to do with the matter. This case has always been followed in England.

There seems to be some confusion in the decision of *Anderson v. Thomson*. If a legacy is specific, the testator can only have intended that the *res legata*, or nothing, should be taken, and if the subject of a specific legacy does not exist, the question of revocation can hardly arise. Special considerations against ademption may arise from the testator's knowledge or power of acting, although direct proof of intention is incompetent. But if it be ascertained (as it seemed to be in *Anderson v. Thomson*) that the testator intended the legacy to take effect after the change on the *res legata*, this shows that the legacy was not specific at all, but either general or demonstrative. The latter is the most favoured species of legacy, for it does not abate until the particular fund pointed out is exhausted, and it is not subject to ademption by the alienation or non-existence of the fund. In judging whether a legacy is specific or demonstrative, the Court should take into view, not merely the words of bequest, but the whole relationship of the parties. When the original intention is clearly ascertained, the question of revocation can be more safely answered.

A PROCURATOR-FISCAL—WHAT HE WAS, WHAT HE IS, AND WHAT HE WILL BE.

NO. XIV.

OUR attempt to deduce, from the Dunbog cases, the principles on which Procurator-Fiscals' responsibilities to accused parties are to be fixed, would be incomplete without a notice of a third case which was connected with that—at the time—famous explosion, and which went to the House of Lords. The defenders in it, doubtless, were the chief constable of the county, and a sergeant in the police force in the county of Fife, but as they can, equally with the Procurator-Fiscal, claim the privilege accorded to officers of the law in civil actions of damages, it is most valuable to possess a statement of the principles settled by the Court of Appeal. Further, Lord Colonsay was present at the decision in the House of Lords as a Judge of Appeal, and attempted, but very feebly, to

justify his own previous decision as one of the First Division. The case, *Pringle v. Bremner and Stirling*, is only reported in the House of Lords (5 Macp., H. of L. 55). In the Court of Session, Lord Ormidale, as Ordinary, allowed as one issue, whether the defenders "wrongfully and illegally searched" the pursuer's house, and a second, whether the defenders "wrongfully and illegally apprehended" and detained the pursuer? "leaving it for the defenders to show at the trial, if they can, that they had a legal warrant for what they did." This was afterwards in effect supported by the House of Lords, who thus declared that there are circumstances in which actions of damages, without averments of malice and want of probable cause, will be allowed; but with this important safeguard (per Lord Chancellor), that the officer's conduct, although it could not have been justified, "would have been excused by the result." Lord Cranworth was more explicit, for he disclaimed any intention that "we should bring into doubt the proposition that a constable, or police officer, has authority to take a person into custody, if he has probable ground to suppose that he is a party who had committed a felony. Nothing of the sort follows from our holding that a relevant case is here stated. All that we decide, in holding that there is a relevant case here stated, is that, *prima facie*, a wrong was done which enables the pursuer to have his case tried by a jury, although it is possible that the wrong complained of may be justified by showing that the person, who is alleged to have committed it, was a police officer, and either that he had a warrant which authorized him to do what he did, or that, a felony having been committed, he had reasonable ground for the course he pursued in taking possession of certain documents, and also imprisoning the person alleged to have committed the felony. It seems to me that the whole question is left entirely open, and that, unless it were left to be tried by an issue or issues, wrong would be done to the pursuer." Lord Colonsay was of opinion that the question had been thus narrowed to—"whether it is for the pursuer to allege that there was no reasonable ground, or whether it is for the defenders to set forth that there was reasonable ground." "The view taken by your Lordships is, that he (the pursuer) has set forth enough to make it the duty of the defenders to set forth that they had reasonable grounds for what they did." A door seems thus to be opened for a pursuer of an action against a Procurator-Fiscal getting rid of any obligation, to allege malice and want of probable cause. The action has merely to be brought on the allegation that the Fiscal "had no warrant for his proceedings, which were wrongous and illegal." Supposing the action to be so brought, and an issue granted as in *Pringle's* case, it remains to be seen how the defence, indicated by the House of Lords, as competent, is to be met by the pursuer consistently with the rules of procedure recognised by the Court of Session. In the case of *M'Bride v. Williams and Dalzell*,

28th Jan. and 22nd May 1869, 7 Macp. 427 and 790, which, although it was not an action of damages against a Fiscal or Chief Constable, raised the point we are now considering, an issue was given without imposing on the pursuer the burden of proving malice and want of probable cause. The defenders might have required to meet the charge, exactly as Lord Cranworth supposed that the defenders in *Pringle's* case would do, by justifying the wrong complained of by showing that the persons who committed it were privileged persons. But privilege there emerged upon the evidence led by the pursuer, and thereupon the pursuer—without malice being put in issue—proceeded to adduce evidence to instruct malice on the part of the defenders. To this the defenders objected, but the Lord President allowed the evidence of malice to be given, and, upon a Bill of Exceptions to his Lordship's ruling, it was unanimously sustained by the First Division. The ground of their doing so, however, was that the pursuer had "averred malice on record." What would have happened if, as in *Pringle's* case, malice had not been alleged on record, cannot be held as settled. It is true that Lord Ardmillan said—"If he has not alleged malice on record, his case is gone. But if he has alleged malice on record, then, though the issue framed on the footing of the absence of privilege did not contain malice, he is in my opinion entitled to prove malice to meet the privilege," and the other judges concurred. Lord Ardmillan makes a reference to English procedure, and quotes Broome's "Commentaries on the Common Law," as supporting his views. The passage in the work so referred to, however, does not do this. Dr. Broome says (5th Edition, p. 734), "Our law will permit the inference of malice, raised by the publication of libellous matter, to be rebutted by proof of circumstances, showing that the statement complained of was privileged; but this defence may itself be rebutted, or altogether neutralized, by proof of actual express malice." "The rule," said Lord Campbell, C.-J., "is, that if the occasion be such as repels the presumption of malice, the communication is privileged, and the plaintiff must then, if he can, give evidence of malice. If he gives *no* such evidence, it is the office of the Judge to say that there is no question for the jury, and to direct a nonsuit or a verdict for the defendant. If, however, at the close of the plaintiff's case, there is *any* evidence which would warrant the jury in inferring actual or express malice, the Judge cannot withdraw the case from them." There is here no such limitation as the Court of Session imposed on a pursuer in *McBride's* case. And hence, although *McBride's* case is subsequent in date to the decision in *Pringle*, we venture, as *Pringle's* case was not cited to them, to think that the Court will reconsider the matter, and on reconsideration not limit proof of malice by a pursuer to rebut privilege of a defender to those cases in which a pursuer has alleged malice on record. In the present doubtful state of matters, however, no pursuer is

likely to omit inserting malice in his summons, while he will as certainly take his issue without it.

In none of these Dunbog cases—which all occurred subsequent to 1864, the year in which the Summary Procedure Act was passed—was the 30th section of that Act, which was passed to limit the responsibility of Procurators-Fiscal and other officers, founded on by the defenders, and they could not do so, as it is limited to questions arising out of a “complaint under the provisions of this or any other Act,” and does not embrace proceedings at common law, such as are all the initial proceedings in ordinary criminal cases. But as if to justify the belief that this was an unintentional omission, it is understood that the Lord Advocate, who introduced and carried through the Summary Procedure Act, arranged for payment by the Government of all the sums for which the Procurators-Fiscal and other officers were rendered liable in the Dunbog cases. Such unwonted liberality should not, however, be trusted to by Fiscals. Even the chance of being, in their day of trouble, thus relieved, has, however, tended to develop the feeling of dependence by the Procurators-Fiscal on Crown Counsel, in preference to their generally unsympathetic Sheriffs and Sheriffs-Substitute.

In cases to which the provisions of section 30 of the Summary Procedure Act can be extended, it limits damages to £5, which, with the amount of penalty (if any), and expenses to date, the Fiscal may tender at any time, unless malice and want of probable cause be alleged and proved; and in cases where these elements are alleged to have been present, the prosecutor is to be entitled to “prove at the trial that the party suing was guilty of the offence in respect whereof he had been convicted, or on account of which he had been apprehended, or had otherwise suffered, and that he had undergone no greater or other punishment than was assigned by law to such offence.” It would rather appear that this last enactment was unnecessary, being only a repetition of what the common law already provided, and it is still less necessary now that by *Pringle’s* case actual guilt need not be proved by a defender, but merely “that, a felony having been committed, he had reasonable ground for the course pursued in taking possession of certain documents, and also imprisoning the person alleged to have committed the felony.”

Of the enactment of a statutory tender, advantage has been attempted to be taken in two cases,—*Rae v. Linton and Bank of Scotland*, 20th March 1875, 2 Rettie 669; and *Craig v. Peebles*, 16th Feb. 1876, 3 Rettie 441. In the latter of these cases Lord Young, the Ordinary, said, “I have only further to observe that section 30 of the Summary Procedure Act is, in my opinion, inapplicable. It relates only to the amount of damages recoverable in cases where malice and want of probable cause are not, as here, essential to liability. In such cases the clause provides that the damages shall not exceed £5, unless the pursuer shall aver and

prove that the proceeding inferring liability was taken or done maliciously, and without probable cause." But this point was not adverted to in the Inner House. In neither of these cases was any reference made, so far as can be gathered from the reports, to what fell from the Law Lords in the case of *Pringle*, which was unfortunate, as it may fairly enough be put, as we shall attempt to show, in a different category.

In *Rae's* case the pursuer, although he had averments of malice and want of probable cause on record, attempted to get an issue without these elements. The Lord Ordinary (Craighill) adjusted issues, in which he put on the pursuer the burden of proving malice and want of probable cause, and the pursuer went to the Second Division to get relief from this burden, but was unsuccessful. The Lord Justice-Clerk (who was the Lord Advocate while the Dunbog cases were pending, and seems to have had in view *Pringle's* case, as well as the other Dunbog cases) remarked that "the line of demarcation between a proceeding entirely without warrant of law, and one in which the law has not been accurately carried out, is in some cases very subtle;" and then his Lordship proceeds to justify the introduction of the words objected to into the issue on much the same grounds which Lord Colonsay took in *Mains v. MacLulich* (ante, p. 26), and *Williamson v. Linton* (ante, p. 27), but which his Lordship did not vindicate in the House of Lords in the case of *Pringle*. "It is found that the complaint is not relevant,—not that it did not set forth what might be a crime, but that the acts averred did not amount to the crime libelled." "A public officer in the discharge of his duty, although an error has been committed, cannot be made responsible without an allegation of malice. The case of *Bell v. Black and Morrison*, 3 Macp. 1056, was very different. The *ratio* of that judgment was that the proceedings complained of had not even a colour of law. It may turn out that the defenders knew things which ought to have prevented them acting as they did, but in that case it will be easy to prove malice. Malice and want of probable cause must enter the issues." The other judges—among whom was Lord Ormidale, whose judgment in *Pringle's* case was affirmed by the House of Lords—concurred with Lord Moncreiff.

In the case of *Craig v. Peebles*, the pursuer had both averments of malice and want of probable cause on record, and wished to put them in issue. The Court, however, would not give him any issue, and they laid it down that a pursuer will not be allowed an issue of malice and want of probable cause, when the Court are satisfied, from the pursuer's own statements, that the defender had probable cause. It is true that, in *M'Bride v. Williams and Dalzell*, the Lord President had assumed that it was his province, as presiding Judge, to intervene in the case while it was proceeding before the jury, and intimate to the pursuer that he must, in order to succeed, prove malice and want of probable cause in the defenders, and was

supported in his doing so by the First Division. But in *Craig v. Peebles*, the Court, on the authority of the case of *Urquhart v. Dick*, 10 June 1865, 3 Macp. 932, held, that what constitutes probable cause is a question for the judge and not for the jury. Lord Ormisdale however added—"that that is so cannot, I should think, be disputed, subject always to the remark that it may be for the jury first to ascertain and find the facts where they are disputed." Lord Gifford did not take up that position, but explained that "the question, whether the prosecutor had or had not 'probable cause' for raising and insisting in the proceedings complained of, is, in this particular case, a pure question of law." "There is no dispute as to the facts, or the material facts," and "the question is, can we not now decide the question of law whether or not the prosecutor had probable cause for the prosecution? We are in just as good a position to decide this question of law as after a long proof, in which the undisputed facts would be disclosed, and it is highly expedient, if we can as safely and conclusively determine the question of law now, that we should do so, instead of waiting until there has been a jury trial." Lord Gifford thus justified his exercising *before* trial the jurisdiction which generally comes to be exercised *after* trial, under a Bill of Exceptions and motion for a new trial. The more interesting point is what all the judges considered amounted to probable cause. "The very fact," said Lord Gifford, "that the Inferior Court and the Court of Review took different views, affords of itself the strongest presumption that the law was doubtful, and that therefore the prosecutor did not proceed without probable cause. His cause was so probable that he actually succeeded in it before the Court of the first instance, and although the Court of Review, the Court of Justiciary, held that he was wrong in law, and quashed the conviction, this does not in the least show that he had no probable cause to institute the prosecution." This comes very near the *dictum* of Lord Colonsay in *Mains v. Macullich* (ante, p. 26), and *Williamson v. Linton* (ante, p. 27). Lord Young, Ordinary, in *Craig v. Peebles*, made a remark in his opinion which seems to support this, "I regard the case as important, because of its bearing on the liability of prosecutors to actions of damages for mistaking the law. Regularity of procedure is exacted of them under pain of damages, but a mistake on a point of law, as to which Judges may not unreasonably differ in opinion, is another matter, and to extend their liability to this extent would, I think, prejudicially interfere with the administration of justice."

Further, Lord Neaves noticed a point which distinguished the Dunbog cases, viz., that they were all *ex parte* proceedings, and not regular judicial proceedings, that is, cases in which the persons accused were called upon to compare, or be heard for their interest. "It is a rule," his Lordship said, "necessary for the protection of officials, and indeed of litigants in general, that a

person instituting *regular judicial proceedings* is not liable in damages, unless it be averred and proved that he acted maliciously and without probable cause." The case of *Davies and Co. v. Brown and Lyell*, 8th June 1867, 5 Macp. 842, may here be noted, as showing how very far this privilege is extended to litigants; and if the fact of the *ex parte* character of the criminal warrants complained of in the Dunbog cases is borne in mind in considering the application of these decisions, including that of the House of Lords in the case of *Pringle*, it would seem that in *regularly litigated cases*, at the instance of a Procurator-Fiscal, the privilege which necessitates both the allegation and proof of malice and want of probable cause exists unimpaired. *Mains v. Macullich*, and *Rae v. Linton*, and *Craig v. Peebles*, were all litigated cases, where the accused compeared and were heard. But as regards all the initial and secret stages of criminal proceedings, especially the obtaining search warrants, that privilege is more than doubtful, and accordingly Procurators-Fiscal cannot be too careful, all the more so that, if Lord Young be right, the benefits of a tender under section 30 of the Summary Procedure Act are not available to them.

It only remains to notice that in *Mains v. Macullich*, and *Craig v. Peebles*, the defenders were Procurators-Fiscal of the Justice of Peace Court, while in *Rae v. Linton* the defender was the Procurator-Fiscal of a Police Court; and yet all of them are spoken of as public prosecutors. The Procurators-Fiscal of Sheriffs have thus no monopoly of that high-sounding title.

(To be continued.)

ON CERTAIN PRINCIPLES AFFECTING THE LIABILITIES OF MASTERS AND SERVANTS.

THE decision pronounced by the Judges of the Second Division on the 13th of November last in the case of *Wyper v. The Stevenson Iron and Coal Company* (not reported), although it does not add much, if anything, to what had been previously laid down, belongs nevertheless to an interesting and instructive branch of the law of reparation. Judicial authority has, in point of fact, created the law upon this special subject, and has enunciated its principles in a very clear manner. Nevertheless we are met by considerable difficulties if, for instance, we merely attempt to reconcile even the legal maxims relating to Master and Servant, and the liability of the former for the acts of the latter, so contradictory do these appear when their effect is fully considered. Let us for a moment take as an example the somewhat trite maxim *culpa tenet suos auctores*; it will never be questioned that where an injury has been inflicted by one person upon another the sufferer is entitled to be compensated by him who caused the suffering. Then turn to the next maxim,

respondet superior, and we advance a step further. The master is made liable for his servants' acts, or, to use examples employed in the House of Lords, "if a servant driving his master's carriage along the highway carelessly runs over a bystander; or if a game-keeper employed to kill game carelessly fires at a hare so as to shoot a person passing on the ground; or if a workman by a builder in building a house negligently throws a stone or brick from a scaffold, and so hurts a passer-by, the injured person has a right to treat the wrongful or careless act as the act of the master." The law is quite settled as regards this, although it has been pointed out very forcibly a few months ago that a rule based upon these and similar considerations had much more reason for its enforcement in the days when masters exercised somewhat unlimited powers over their servants and work-people; and that, owing to the development of intelligence amongst all classes of the population, and to the power of law and love of order, it might be salutary were a wider interpretation of the first maxim introduced by statute. It is, indeed, conceivable that in some cases the rule may press with hardship; but where the object of the master is luxury, as with carriages; or pleasure, as with sport; or profit, as with mines, it seems only fair that the person by whom the additional risk has been created, for whose luxury or pleasure or profit the public are more endangered, must take the consequences, and bear the loss when accidents occur. All this is quite in accordance with the principle of the maxim *qui facit per alium facit per se*; but the actual difficulty is felt when we make an attempt to reconcile this with the first maxim quoted, and essay a solution of the question based at once upon equitable considerations, and upon some general grounds in law equal to the strain of any emergency.

Although some degree of uniformity has been produced in the ultimate results, at least by the dicta of our Judges during the last two decades, yet there has been in the public mind a growing sense of uneasiness (to put no stronger term upon it) at the direction into which the stern rules of logic have been gradually forcing out law from the standpoints originally taken up in 1837. This feeling has developed a movement, communicated to the Houses of Parliament, for legislative interposition, and for some distinct definition of the mode and the occasions in which employers are, or are not, to be made liable for injuries to their servants. Accordingly, in June 1876, a Select Committee of the House of Commons was appointed "to inquire whether it may be expedient to render masters liable for injuries occasioned to their servants by the negligent acts of certificated managers of collieries, managers, foremen, and others, to whom the general control and superintendence of workshops and works is committed, and whether the term 'common employment' could be defined by legislative enactment more clearly than it is by the law as it at present stands. This committee took evidence and reported in favour of further inquiry,

and accordingly they were reappointed in 1877, and took further evidence, and at length, on 25th June 1877, they made a report.¹ To this report we shall refer more particularly hereafter, and also to the salient points of the evidence given before the committee, when many extremely interesting features of the question were referred to and explained; at present probably it will be better in the first place to examine the position of the law as it stands upon this important subject, and to note the result of the gradual progress of the doctrine to which the inquiry of the committee was directed.

There is, as we have indicated, only judicial authority, without any statute law, for the well-established doctrine of the liability of masters for the acts of their servants; and there is no more stable foundation for the development of the principle in another doctrine which has taken root and expanded into an exception to the general rule, and an exemption from liability on the part of masters. It is now a fixed principle in the general law regulating the position and obligations of a master towards his servants, that, as an implied result of the contract, the master is freed from all claim by one servant for the injury caused by the fault or negligence of another person employed also in the common service, provided he be reasonably qualified and competent for the duties required of him in the fulfilment of such service. The case of *Wyper* turned upon this question, and we propose to consider the subject first in relation to the manner in which the law has been developed, so as to reach its present footing, and then more particularly to call attention to one or two slight features in *Wyper's* case which seem to indicate that unless there be definite legislation upon the whole matter, the force of successive judgments may not even yet be spent, and the law, as expounded by the judgments of its Courts, may be found advancing still further in the same direction. A brief reference to a few of the leading cases will probably suffice to show the total revolution the law of Scotland has undergone upon this particular subject in the short space of thirty years. It will be observed that at the outset the Court held that reparation was due by the employer in all cases where injury had been caused by a fellow-workman's negligence, and that it was not until a later period, when this liability had been repudiated in the House of Lords, that the more delicate and difficult questions arose as to what was "common employment," and who were fellow-workmen, and whether such a term could be applied to all grades working under one master, or to various bodies of men working even under separate contractors, though for the purpose of carrying out a single object. The first authority we shall cite (*Sword v. Cameron*, 13 Feb. 1839, 1 D. 493) will sufficiently indicate the former state of our law, and enable us more readily to see the change by contrasting what then was with what now is. An action was in 1838 raised by a man named *Sword* in the Sheriff-Court of Perthshire, concluding for damages

¹ For report see *Journal of Jurisprudence*, 1877, vol xxi., p. 62f.

against Cameron, the tenant of a quarry near Perth, on the ground of injury inflicted upon the pursuer by negligence of a fellow-servant, who had, when blasting, not given sufficient warning to enable the other workmen to retire before the explosion. The liability was not disputed, only the negligence; and that negligence having been, as the Court considered, established by the proof, damages were awarded. It is not necessary for our purpose to enter further into the questions raised, one sentence from the Lord Ordinary's note sufficiently shows on what the judgment was based. "There is no doubt about the law. The defenders do not deny that if the injury was produced by the negligence of their workmen acting for them, they are liable in reparation. So it is entirely a question of fact."

It was, however, only two years earlier than this that a somewhat similar question arose in England, to meet with very different treatment. We refer to the judgment in *Priestly v. Fowler*, pronounced in 1837, where the plaintiff was a journeyman butcher, who sued his master for damages caused by the break down of a van overloaded with meat by a fellow-servant. Not to enter further into detail, Lord Abinger, in the opinion he gave, really laid down the principle now recognized in this country also, that the master is protected from responsibility for injuries sustained by one of his servants through the wrongful or careless act of another. We do not require to follow the English authorities which served to rear up the edifice founded by the decision in *Priestly's* case, but in Scotland the Courts held to their own views, and as time went on they decided other cases upon the same lines as that of *Sword v. Cameron*. At last, however, a sudden change was initiated by the well-known case of *Reid v. Bartonshill Coal Company* (17 D. 1017, 20 D. H. L. 13), which came into Court in 1856. The Court of Session repelled a plea by the defenders of non-liability founded on the doctrine of *collaborateur*, and afterwards a jury, under directions from the Lord President, gave damages. The defenders appealed to the House of Lords against an interlocutor of the First Division sustaining the direction, and the result was that the company established their immunity from liability. Lord Cranworth pointed out that "where an injury is occasioned to any one by the negligence of another, if the person injured seeks to charge with its consequences any person other than him who actually caused the damage, it lies on the person injured to show that the circumstances were such as to make some other person responsible. In general it is sufficient for this purpose to show that the person whose neglect caused the injury was, at the time when it was occasioned, acting not on his own account, but in the course of his employment as a servant in the business of a master, and that the damage resulted from the servant so employed not having conducted his master's business with due care. In such a case the maxim *respondent superior* prevails, and the master is responsible." Then

turning from the position of a master rendered liable for the act of his servant towards a third party in this manner, the same learned Lord proceeded to consider whether the liability of a master to one servant injured by the fault of a fellow-servant was upon the same footing. The House of Lords held in the *Bartonshill* cases (for there were two actions of the same kind brought simultaneously against the employers) that the liability was not the same, for the workman in undertaking the work knew, or ought to have known, the risks of the particular employment upon which he was entering. The two arguments in the mouth of a third party would be taken from the fellow-workman. A stranger might say he could not tell whether the master was to blame or the servant, but the fellow-workman knew perfectly well where the fault lay. Again, while a stranger might say the particular thing need not have been done or ordered by the master, the fellow-workman himself was a party to the contract for doing it. The House, in fact, decided the question in favour of the master where the evil was caused by "carelessness of a fellow-workman engaged in a common work." Thus far the law of Scotland and the law of England were brought into uniformity in 1858. But the next case upon this branch of law which went to the House of Lords carried the principles of the earlier decision a step further, for the question of various grades among the workmen was there introduced.

In 1863, Henry Wilson, a miner in the employment of the firm of Merry & Cunningham, coalmasters, near Glasgow, was killed by an explosion of fire-damp. He was engaged by the manager of the pit, and was killed by being blown from a temporary scaffold on which he was working. His mother brought an action against the firm (*Wilson v. Merry & Cunningham*, May 29, 1868, 6 Macph. H. L. 84), alleging that from want of proper ventilation fire-damp had accumulated under the temporary erection, and that therefore the defenders were responsible. The question in this instance differed from the *Bartonshill* case so far that the fault or negligence was said to have been on the part of a man who, holding the situation of manager of the pit, was not, the pursuer maintained, in the position of a fellow-workman, although admittedly a competent man for the duties of the office with which he had been intrusted. At the trial Lord Ormisdale directed the jury that the firm were not in law liable for the consequences of the accident when a fellow-workman was in fault, and that the underground manager must be deemed a fellow-workman, being engaged in a common employment with Wilson; the Judge also explained that the employers were not liable where no one could have foreseen the accident, and where it could not by due care have been prevented. In this particular case, however, it was said that the explosion of fire-damp which led to Wilson's death had been caused by insufficient means of ventilation through the scaffold on which he was working, causing thus an accumulation of the dangerous gas beneath it. It was explained

also to the jury by the Court that a distinction might exist between keeping the system of ventilation in good order, as it was when Wilson was engaged at the pit, and having faulty arrangements in the system itself. Further, it was said, if the whole ventilating system had, prior to the employment of Wilson, been completed by the manager, and if the whole authority of the firm had been delegated, then the manager and Wilson did not stand in the relation of *collaborateurs*, and if the manager were guilty of any fault as to the ventilation, the firm could not plead the principle of *collaborateur* in bar of their liability. To this direction the defenders excepted, and the First Division allowed the exception. The pursuer carried the matter to the House of Lords by way of appeal against this decision, but the judgment was affirmed. In expressing their opinions the House entirely endorsed the previous judgments as to the general question of master and servant, and the Lord Chancellor summed up in a few sentences the whole doctrine:—"The master is not, and cannot be, liable to his servant, unless there be negligence on the part of the master in that in which he, the master, has contracted or undertaken with his servant to do. The master has not contracted or undertaken to execute in person the work connected with his business. The result of an obligation on the part of the master personally to execute the work connected with his business, in place of being beneficial, might be disastrous to his servants, for the master might be incompetent personally to perform the work. At all events, a servant may choose for himself between serving a master who does and a master who does not attend in person to his business. But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this, he has, in my opinion, done all that he is bound to do."

It was further observed that, carrying out these principles, and using words employed in another case, "negligence cannot exist if the master does his best to employ competent persons: he cannot warrant the competency of his servants." To leave the jury to decide whether all the employers' authority had been delegated to their manager, as was done at the trial, was, the House of Lords held, not warranted by the evidence, and the suggestion of a distinction existing between the completion and non-completion of the temporary scaffold before Wilson entered the employment of the firm was also considered an error in the direction to the jury. "It was therefore incorrect on the part of the learned Judge to confine the act of negligence to the one period of the completion of the system of ventilation, and thereby to conclude the question as to Neish and the deceased being fellow-workmen when the accident happened."

As to the distinction made between one class of servants and another, a distinction completely overthrown by this case of *Merry*

v. *Cunningham*, there is no doubt that in Scotland it was recognized even as late as *Sommerville v. Gray & Co.* (1 Macph. 768), but in England there were several cases where various Courts refused to give effect to such a contention, and the point must now certainly be held a settled one. In the case with which we are at present concerned there was no doubt that Wilson, the victim of the accident, was employed at the pit, and did not in any way stand in the position of a stranger to the owners; and the test applied to the position of Neish, the manager, was a reference to his functions "in the organism of the force employed, and of which he forms a constituent part." His special authority was only that of a superior grade, with those above him and those below him. It is clear that once admit a difference between various ranks of servants, and you have immediately endless questions in every branch of labour. Take for example these very collieries: there would be the head manager and the underground manager, all the various gradations of engineers, firemen, and so forth; indeed, the whole organization of the pit being founded on divided responsibility in various grades, the owners could but rarely free themselves from the consequences of any accident. This, indeed, is the avowed object of the inquiry before the Select Committee, and, as we shall presently see, the opinions on the matter expressed by the witnesses examined are very different, and not readily to be reconciled one with the other.

After this decision of the House of Lords in 1868 no further appeal to that tribunal was made, and for nearly nine years the cases arising out of this branch of law seem as a general rule to have been decided upon specialties, with one, or at most two exceptions, of which we shall shortly take notice. At last, however, the whole subject was again very fully discussed in the case of *Woodhead v. The Gartness Mineral Company*, decided Feb. 10, 1877 (4 Rettie, 469). And probably now, until some legislative change is effected, the question of liability cannot be again raised with any prospect of success on the part of those claiming compensation, unless under very special and exceptional circumstances, so thoroughly do the Court appear to have endorsed the arguments of the defenders.

In this case of *Woodhead* the Gartness Mineral Company maintained that they were not liable in damages to the pursuer upon two grounds: firstly, that the death of Woodhead was caused by the fault of the underground manager, and he was with Woodhead a fellow-servant of the defenders at the time; and, secondly, that even if the question of *collaborateur* were not involved, the injury was an incident of the work, and Woodhead must be held to have undertaken this risk. A few sentences will suffice to explain the circumstances under which the case arose. Woodhead, a miner, was killed in a pit belonging to the Gartness Mineral Company, and the action against the pit-owners was raised by his father. The Company had sunk a pit to the depth of one working level, and they discharged their

men (Woodhead being one of them), but entered into a contract with two miners to drive the east level at a certain rate of payment per yard. The contractors set to work, and Woodhead was one of those employed by them. At the same time a different contractor undertook the further sinking of the shaft; and both operations went on simultaneously. The Gartness Company had retained a manager and an overman to look after the pit in general. The removal of a plank for purposes of better ventilation by the overman, acting under the orders of the manager, caused the accident, but it was admitted that the manager and overman were competent persons for the performance of the duties intrusted to them. The result of the case was to establish the rule that where a miner becomes one of an organization such as existed in this pit, an injury caused by the fault of another member of the organization does not render the mine-owners liable. In the case of *Wilson v. Merry & Cunningham*, already referred to, the position of the persons was that of manager and workman; here, however, they were united together by a yet more slender tie. In the former case it has been a question of variety in grades, here there was also a question as to whether the men employed by the contractors stood in the relation of fellow-workmen to those employed directly by the company, so as to bring into operation the established rules of exemption from liability governing all cases of "common employment." This risk, it was decided, had been undertaken by the person hiring himself, and the only remedy was against the overman who had directly caused the accident. The Lord President briefly summed up the decisions in these words: "As the result of the whole authorities, it appears to me that one of the conditions subject to which every man must become a member of one of these great organizations of labour is, that he shall take on himself all the perils naturally incident to the work he undertakes, without looking to any one else to guarantee him against, or indemnify him for, injury sustained from the occurrence of such perils. This does not interfere with the principle of personal liability for the consequences of personal wrong or negligence, but it excludes all notions of what, for the sake of distinction, I shall call secondary responsibility." It was further pointed out that the application of the principle was not limited by the greatness or smallness of the works or establishment, and that, of course, it had equal force in the shop or the household, but that the larger the scale of operations the more easy the illustration became.

Again, as to the other point maintained by the pursuer Woodhead, it was urged that the victim of the accident was not the servant of the Gartness Mineral Company at all; he had left their service, and had entered that of the contractors, and accordingly he stood to the pit-owners in the relation of a stranger injured by the fault of the employé of an entirely different master. This view, however, was rejected by the Court, who regarded the whole body of men occupied in the mine as merely carrying out the various

parts of one common labour for one end, and specially so under the Coal Mines Regulation Act, and the special rules prescribed for "miners and other workmen," who are by one provision placed under the orders of the roadmen for certain purposes, and that "whether employed by the owner or the miner." And reference was also made to a general rule couched in these terms: "Such miners and other workmen are, and shall be, generally subject to the control and orders of the agent where one has been appointed, and of the manager and overman; but they shall also be subject to any directions which the roadman, engineman, fireman, or bottomer, may give in their respective departments for the purpose of preventing the workmen from infringing or ceasing to comply with any of the provisions of the Act, or of the general or special rules." It so happened that in this case the contractor acted as bottomer, and thus was paid wages as such by the Company, who had agreed to allow him so much for bottomer's wages; but we do not think this would, or should, be allowed to interfere with the general principle laid down. It was pointed out also in the opinions delivered by the Court that the policy of the Mines Regulation Act would be nullified were persons employed, as Woodhead was, by a contractor, to be regarded as exempt from the special rules; but the very terms of the statute itself as already quoted showed that this could not be intended. Such an arrangement would render "each miner who employs and pays his own drawer a separate establishment; and each miner would be answerable for the negligence of his own drawer; while the mine-owner would be answerable for any servant of his who by negligence inflicted an injury on a drawer, but would be exempt from liability though his servant by negligence killed any number of miners." The Lord Justice-Clerk in dissenting from the opinions given by the other Judges, referred to several cases which had been decided both in England and in Scotland during the nine years intervening between *Merry & Cunningham's* case and this action against the *Gartness Mineral Company*. It may perhaps be instructive to follow the opinion delivered by his Lordship as to the three English authorities and the four Scotch ones to which reference was made. The English cases are (1) *Abraham v. Reynolds* (1860, 5 Hurl. & Nor. 143); (2) *Indermaur v. Dames* (1868, 36 L. J. C. P. 181); and (3) *Smith v. Steele and Others* (Jan. 25, 1875, 10 L. R. Q. B. 125). In the first of these cases the question arose through an injury inflicted upon a carrier's man hired by a corn-dealer with horse and cart. The carter by the fault of the corn-dealer's servants was injured when engaged along with them in loading his cart at the warehouse. The Court decided against the corn-dealer, finding that the carter was not in the position of a fellow-servant. In the second instance a gasfitter was employed through a contractor for certain fittings at the works of the defendants, and when examining the apparatus to see that it was in proper working order he fell through an open trap. Here,

again, the Court found the owner of the premises responsible. Lastly, in the third English case mentioned, a pilot was killed when going on board a vessel owing to the carelessness of the crew, and the owners were held liable. These three cases, we venture to think, were regulated by the principle laid down in *Merry & Cunningham*; the main distinction was preserved in each. The carter had really no relation to the corn-dealer, even his master the carrier had little or any, certainly the corn-dealer could in no way have over the man the control of a master; again, the gasfitter was there on a separate matter altogether apart from the works, a special employment in which the servants at the works had no common interest; while the pilot could not by approaching the vessel in his licensed capacity be said to fall into the situation of fellow-workman with the crew, as the mate or the boatswain would do.

Among the four Scottish decisions mentioned there was one, *Gregory v. Hill* (8 Macph. 282), to which several of the Judges referred, expressing an opinion that it was opposed to the current of the decisions. In that case the Second Division found the master liable where he had contracted with a joiner for the wood-work, and the journeyman was injured by the negligence of a mason, the proprietor's servant. Lord Shand, in making observations upon this judgment, said that "where a number of persons are engaged, though in different capacities and departments, in the common work of building a house, or a ship, or in any similar undertaking where, from the very nature of the work, they have duties to each other, and although the employment is only indirectly from the same source—the particular classes of workmen having their direct and immediate employment from their own master—there is yet such a bond of union amongst all of them as makes them one family or establishment, and precludes one of them, if injured, from imposing responsibility on the master of another workman, as a stranger, if injured, might do." To pass to the second case, *Wyllie v. Caledonian Railway Co.* (9 Macph. 463), again we find that there is wanting the essential features of the common employment, for Wyllie was a drover engaged in delivering and in trucking cattle along with the Company's servants when he was injured by a train striking the trucks where he was working. The Court regarded the question as one of giving and taking delivery under a contract of carriage, and it was remarked that he was as much a stranger "as if he had been helping an invalid lady into a first-class carriage, and had been injured by a sudden and violent motion of the carriage, caused by the fault of the railway company's servants." In the two other cases, *Calder v. Caledonian Railway Co.* (9 Macph. 833), and *Adams v. Glasgow and South-Western Railway Co.* (3 R. 215), the question arose through the injury of the servant of one railway company by the fault of the servants of another company, when the injured person was travelling over the strange line in virtue of running powers enjoyed by

his employers. The comparison was made of a person driving his carriage along a turnpike road and being upset by the fault of the road trustees and their servants.

Perhaps these judgments seem to point at the possibility of finding a test for the liability in the character of the undertaking upon which the persons are employed. There seems to be a sort of *unum quid* in all those instances in which exemption from liability has been established, whereas in all other cases the links in the chain are imperfect; either the work in itself is not part of a whole undertaking, is a separate or readily separable matter, or else the two principals are evidently independent of one another though brought together at one point, so to say, by the contract existing between them. Sometimes again we have to some extent a combination of both of these features, and the principals and the work alike are distinct; such a case as *Wyllie* exemplifies this very well: the two principals were quite apart, the work was distinct, delivery and receiving of the cattle, yet in the carrying out the contract there was almost necessarily united though not common labour.

It is remarkable that in the case of *Woodhead*, among the numerous decisions quoted at the bar and referred to by the Court, there is not to be found any reference to a very interesting and important authority upon this subject decided in 1872, and therefore, of course, in date nine years subsequent to *Wilson v. Merry & Cunningham*. The case we allude to is not reported, except in the *Scottish Law Reporter*, vol. ix. p. 254, under date 27th January 1872, as *Grant and Others v. The West Calder Oil Company*, and we take this opportunity of briefly stating the circumstances out of which the action arose, as in many respects they strongly resembled those in *Woodhead's* case. Shaw, a miner, was killed by the breaking of a wire-rope used in raising and lowering the cage of a shale pit. Of this pit the West Calder Oil Company were the lessees, and they had contracted with a person named Boyd to work the seam for them on being paid a contract price per ton on the output. Boyd supplied all furnishings, maintained the machinery and fittings, and paid the men employed. Not only that, but he made himself liable for accidents of every description about the pit, above as well as below ground, and was to satisfy himself that the shaft and fittings were safe. Finally, it was provided that none of the Company's workmen were to be taken by the contractor, nor the contractor's men by the Company, unless by mutual consent. The case went to trial upon an issue as to whether the pit in question was held by the Company on lease, and by them worked, and whether the miners were killed by their fault. Lord Ormisdale, who presided, charged the jury and gave them the direction that if they were satisfied that when the accident happened the pit with fittings was in the occupation of Boyd, and worked by him as contractor under the agreement, and that the deceased were in Boyd's employment at the time, then in law it could not be held

a case of fault on the Company's part. The pursuers took exception to this direction; and further, they asked the presiding Judge to give the jury directions, which may briefly be stated as to this effect: (1) that Boyd was not an independent contractor, but a servant of the Company; (2) that if the jury were satisfied that the machinery belonged to the Company, and that the miners were not made aware of the terms of the agreement between the Company and Boyd as to maintenance of machinery, but only that he had contracted to work the shale, then Boyd was to be held as a servant of the Company, and the liability, of course, ensued.

Lord Ormisdale, however, refused to give these directions, and the jury found for the defenders, adding that "had it not been for the legal interpretation put upon the contract by the Judge, they should, by a majority, have given their verdict in favour of the pursuers." A bill of exceptions was presented to the First Division, but disallowed. The only opinion given in the report is that of the Lord President, from which we extract the following sentences:—"I certainly think that the possession of this pit was fully given over to Mr. Boyd if he got possession of it in terms of this contract, and that in employing men to work the shale in that pit he was employing them on his own responsibility. They were in contract with him for the work they did, and the wages they received, and with no one else. This is made even more plain by the special arrangement at the close of the contract, that neither party should interfere with the other's workmen. . . . I can only say that if the contractor began to work the pit in terms of this contract, and engaged men to work the shale, they were his servants, and nobody else's. He was their master, and the law admits of no doubt that an action for damages under circumstances such as these must be raised against the person who is master."

It is interesting to mark the distinction between *Woodhead's* case and this one. In both instances there was a contractor interposed between the workman and the pit-owners. The object of the contract in 1872 was to do the whole work of the pit, whereas in 1877 it was only to drive a level and sink a shaft to a greater depth. The West Calder Oil Company transferred everything to their contractor, and reserved to themselves only a margin of profit, for the contractor was only to receive a certain output price, and they were to get the balance. The Gartness Company, on the other hand, were really retaining the pit in their own hands, and merely contracting for certain incidental work in it. All the machinery, fittings, etc., were theirs, and remained so. What, however, appears to us the striking feature of difference between the two cases is the remarkable provision made by the West Calder Oil Company in their contract as to servants, and their exclusion thereby from all control as regards the servants of their contractor. This was not so at the Gartness pit; they had their own manager and underground rager, and their special rules framed under the Coal Mines

Regulation Act (35 & 36 Vict. c. 76, s. 52) placed all the workmen under the owner's control. The distinction, no doubt, becomes a somewhat narrow one when brought down to this point (supposing always the authority of *Grant v. West Calder Oil Company* to remain unshaken by subsequent decisions), but it appears to proceed upon a recognition of the same principles which relieve the heritable proprietor from responsibility where he has let his coal or minerals; he has entirely given up his control to those who understand the subject; and in like manner if they in their turn, for some reasons of their own, entirely relinquish control, and bind themselves not to interfere, it seems to follow that they cannot be any longer regarded as standing in the position of employers towards the workmen when machinery gives way and preventable accidents happen.

(To be continued.)

Review.

The Practice of the Court of Session. In Two Volumes. Volume I., History, Constitution, and Jurisdiction of the Court, and Procedure in Ordinary Actions. By *Æ. J. G. MACKAY*, Advocate. Edinburgh: T. & T. Clark.

A WRITER of a book upon the legal procedure of a special Court, be it ever so excellent, can scarcely look for immortality in connection with it. The principles of law are, indeed, universal and immutable, they are the same to-day as they were to the Roman jurists eighteen hundred years ago, and as they will be to our posterity the same period hence; and a well-written work, which treats of the rules of law of any particular system on the basis of legal principle, has value for all time. But the rules of procedure, and the forms of action, being based upon convenience, must be always in a state of transition. Legal forms change as surely as modes of life and actions do. A ready illustration of this, if such were necessary, presents itself in the *Institutions of Lord Stair*. The statement of the principles of law by that writer are no less forcible and authoritative to-day than they were in his own time. But the fourth book of the *Institutions*, which is devoted to the practice of the Courts, has for a modern reader little more than an antiquarian interest. Now it would not seem a bold prophecy to foretell that extensive changes in our existing modes of procedure in the Court of Session must ere long take place. The system can hardly be regarded as perfect, even for the present time, and modern society seems to be advancing by what we may call a sort of geometrical progression. The last half century has seen the procedure of the Supreme Courts, both in this country and in England, altered

in a manner little short of a complete inversion. That the next half century will see many further important changes, especially in the direction of assimilation of the system of the two countries, is an opinion largely entertained.

These, or similar reflections, have, doubtless, been present to Mr. Mackay before he proceeded to pen the elaborate work, the first volume of which is now before us. He does not disguise his views. In his preface he states the matter in a passage which is well worth quoting. After mentioning the frequently expressed desire for a new work on Court of Session Practice, since the Procedure Acts of 1866 and 1868, he gives his reasons for undertaking the task: "For a considerable period doubt has been felt as to the future form, not only of the Court of Session, but of the Law of Scotland. This has not been due only or chiefly to the frequent and partial changes of recent legislation, often made by legislators imperfectly acquainted with the law they altered; it has been the result, also, of more general causes. The centralizing tendency, which has operated since the union, has led to the transfer of much legal business, which was discharged by the Supreme Courts in Scotland prior to that date, to London, while the jurisdiction conferred upon the county or local Courts of the Sheriffs, and made by many statutes exclusive or final, has transferred another portion of such business to them. The diminution of the business of the Court of Session, due to these causes, has been deemed by some to be inevitable, and likely to continue. Persons also, whose opinion and influence were of considerable weight, have at times thought that a sudden assimilation of the Law of Scotland to that of England was possible, and would carry with it, as a necessary consequence, or even as a preliminary, an extensive alteration in the forms and jurisdiction of the Scottish Supreme Court. If these opinions were well founded, any endeavour to state the existing practice of the Court of Session in detail would, it was not unnaturally felt, be to a considerable extent lost labour. But a study of the past history of the Court, observation of its practice as conducted by the Judges who now preside in it, and considerations which can here only be indicated, have led the present writer to a different conclusion with regard to the future. Complete assimilation of the laws and judicial procedure of the two countries now so happily united, must be regarded, indeed, as in the highest degree desirable, provided it is accomplished without sacrificing what is of permanent value in either law. This cannot be accomplished for a considerable time, or by sudden changes. It requires a knowledge of both systems of jurisprudence, which is not possessed by the present, and will scarcely be attained even by the next, generation of legislators and lawyers, either in England or Scotland. When the change is made, it may be anticipated, though the name and form of the Court of Session should be altered, that much of its procedure will be saved. It may even be conjectured that the jurisdiction

and business of the Supreme Civil Court in Scotland will in some directions be increased rather than diminished."

There is great force in all this, and it is reassuring to hear such a firmly expressed belief in the future prosperity of our Supreme Court. We fear, however, that Mr. Mackay is more sanguine on the point than many of his brethren. Certainly one cannot close one's eyes to the too obvious fact that the business of the Court, instead of increasing in the ratio which one would expect from the reforms introduced by the recent Procedure Acts, seems stationary, if not steadily diminishing. When the Daily Calling Lists of new actions frequently appear with only one or two cases in them, when a considerable percentage of the cases in the rolls are seen to be veriest "trash," and when work cannot be found to occupy the time of the Judges of the Outer House, the prospect is not very satisfactory. In his work on "Practice," published in 1848, Sir C. F. Shand remarks on the steady diminution of business in the Court of Session during the half century prior to his publication.¹ He says, "The cases enrolled in the Outer House Rolls averaged, for the four years preceding 1798, 2631 annually; for the four years previous to 1810, when the fee fund was imposed, 2594; for the four years after, 2374. . . . The causes enrolled between 1st January 1843 and 1st January 1844 were 1526, and between 1st January 1846 and 1st January 1847 were 1385." Mr. Mackay does not say anything on this point, but in the Report of Judicial Statistics by Dr. Hill Burton we get a statement of the business of the Outer House during the years 1871-75. The following entry of causes brought into the Outer House, including, apparently, petitions, teind causes, and every form of action, is taken from the report (the returns for the year 1874 being stated to be defective). In 1871, 947; 1872, 1254; 1873, 1321; 1874, 830; 1875, 1146; giving an average of about 1100 cases for each of the five years.² But to whatever cause this want of vitality in its business is to be attributed—and, possibly, it may be at present to some extent due to the general dulness of the trade of the country—it is not at all probable that either our own or the next generation will witness the decease of the Court of Session. It has still many years to live, and much useful work to perform, and to do that work well, and maintain the *venerable nomen*, should be the honourable ambition of its present members. Further we cannot well concern ourselves. We should not attempt violently to counteract, for the imagined sake of posterity, natural tendencies, the ultimate good or evil of which we cannot realize.

But although Mr. Mackay may not be assured of any great longevity for his book, he will have one satisfactory reflection at least,—that no work confers more actual benefit upon one's contemporaries in the profession than a good work upon Practice. And after reading this present volume we will venture to assure the

¹ I., i. 30, p. 5.

² *Vide* Journal of Jurisprudence, vol. xx. p. 540.

learned author beforehand of the thanks of the profession for the great care and ability he has bestowed upon it. Those who have been engaged for the last dozen years as practitioners in the Court of Session well know how greatly the want of such a work has been felt. Since the passing of the Acts of 1866 and 1868—fundamentally changing, as they did, in many respects the rules of procedure—there has been on questions of Practice no authority which could with any confidence be resorted to. Shand's "Court of Session Practice," although a carefully prepared and useful work in its time, had become in a large measure antiquated—having been published so far back as 1848. Excepting, therefore, the assistance afforded by the useful but meagre edition of the Act of 1868 by Scott and Brand, and the statements of analogous rules of procedure in Barclay's *M'Glashan*, and Dove Wilson's "Practice of the Sheriff Court" (both of them excellent works in their way), the practitioner had no guide to the many recent Acts and Rules of Court, and to the numerous decisions on Practice under the recent Acts. The necessary result was very considerable uncertainty and want of uniformity in points of procedure.

Mr. Mackay has commenced his treatise with a brief introductory account of the institution, origin, and history of the Court of Session, and these are not the least valuable chapters in the book. He has been able to bring his well-known familiarity with the constitutional and legal history of Scotland to bear upon the subject. Not resting content with a simple re-statement in a new form of what our institutional writers have said on the matter, Mr. Mackay has evidently gone direct to the sources, and has given us in a much more distinct and intelligible manner than these older writers a survey of the early history of our judicial procedure. The jurisdiction exercised by the king and parliament and different councils prior to the institution of the Court of Session in 1532—a subject about which there has been always a considerable amount of obscurity—is succinctly but carefully examined.

The following is the general arrangement adopted by the author in this volume. It is divided into three parts: Part First treats of the *personnel*, as we may call it, of the Court of Session—its separate courts, judges, advocates, and other members; Part Second, of the jurisdiction of the Court and the parties to actions; Part Third, of the rules of procedure in ordinary actions. In the First Part the chapter calling for special observation is the one devoted to the Bill Chamber, and the Lord Ordinary on the Bills. A very distinct and complete analysis has been given of the various kinds of jurisdiction at present exercised in the Bill Chamber. They are classified under three main heads: first, its original and proper jurisdiction; second, its jurisdiction as a Vacation Chamber; and third, its jurisdiction as discharging the business imposed upon it by recent statutes, such as 19 and 20 Vict. cap. 79, and 17 and 18 Vict. cap. 9. This distinct classification will be of great service, as very considerable

misapprehension on the subject has hitherto existed in the mind of practitioners.

Mr. Mackay is disposed to regard the Bill Chamber, when exercising its proper and original jurisdiction, as being correctly a separate Court from the Court of Session. This is also the view taken by Shand in his "Court of Session Practice."¹ We must confess our inability to agree therewith, nor can we find any sufficient authority for it. Whatever may have been the exact date of its origin, all the authorities seem to point to this, that the Bill Chamber has been a corporate part of the Court of Session ever since its establishment. As part of that Court, it was used for conveniently and summarily inquiring into processes in their preliminary stages, and determining rights of action and appeal, at a time when the Judges had to deal with actions sitting collectively in one chamber. For a long period in its history it was the practice for the Ordinary Lords to take up the work in it in weekly rotation, and the Lord Ordinary upon the Bills seems to have been in much the same position as the Lord Ordinary upon Oaths and Witnesses, or upon Concluded Causes. And all the forms of the Bill Chamber—the language in which petitions are presented in it, and Acts and Warrants pronounced—expressly recognise this connection between it and the Court.² Mr. Mackay traces clearly enough the history of the Bill Chamber, so that there seems the less reason for his adopting the above-mentioned distinction. We are aware that it is usual in everyday practice to speak of cases as passing from the Bill Chamber into the Court of Session, but this seems a loose and inaccurate mode of expression. It is a different matter when we speak, for instance, of the Teind Court as a distinct separate Court; this is proper, but surely the Bill Chamber is, and always has been, a branch or subdivision of the Court of Session.

The chapters which constitute Part Second of this volume are specially valuable. Over a hundred pages have been devoted to the important subject of the jurisdiction of the Court of Session, and the rules falling under this branch of the law have been stated in a more comprehensive, yet concise manner, than will be found in any previous work. The decisions on the subject have been carefully examined, the rules of law deduced from them in a clear and logical manner, and expressed in a simple and lucid style. Especially deserving of attention are Chapters IX., treating of the persons subject to the jurisdiction of the Court of Session; XI., of the Court's privative jurisdiction; and XIV., of the exclusion of its jurisdiction in ecclesiastical causes.

In the Third Part, the author has dealt with the Practice of the Court as it is at present carried on under the Procedure Acts of 1866 and 1868, and relative Acts of Sederunt. This part of the

¹ Shand speaks of the Bill Chamber as a separate Court, and accordingly excludes the treatment of its procedure altogether from his work.—(iii. 12, 2, p. 44, note.)

² See Ross's Lectures, i. 240, and Beveridge's "Treatise on the Bill Chamber."

book will be invaluable for everyday reference. Mr. Mackay has not failed to observe, what has been often subject of dissatisfaction among practitioners, the very considerable looseness and want of uniformity in certain points in the present Practice of the Outer House. Different Lords Ordinary, in the absence of authority, put different constructions on the Acts and Rules of Court, so that we find at one bar a rule rigidly enforced, which at another is as constantly relaxed. Many instances of this, we are sure, will readily occur to our readers. It would be highly desirable, as Mr. Mackay has remarked, that some of these points should be settled by authoritative decision. With the statement of the Procedure in Ordinary Actions (excepting the Procedure relative to Proof), the substantive part of the present volume closes. A copious index, however, and a complete table of cases have been appended, which will be found of great utility. In a second volume, the Procedure relative to Proof, the Procedure in Special Actions, in Appeals, and in Petitions, together with the Rules as to Expenses, are to be taken up.

We must notice the accuracy with which the references to cases and statutes have been given in this volume. Accurate reference to authorities is a matter of no small importance in any book, but it is especially valuable in a law-book. Many otherwise excellent text-books have been spoiled and disfigured by blemishes in this respect. If legal writers would only reflect on the annoyance and irritation caused to those who consult their works by inaccurate references or quotations, they would not so often regard those matters as of little moment. Mr. Mackay has rightly judged that time and labour are not thrown away in securing accuracy. His book, indeed, so far as we have had occasion to test it, seems quite a model in this way. A few slips could not, of course, be expected to be avoided, though we ourselves have detected very few. At p. 58, we may mention, there is a slight misstatement of the statutory rule as to hearings on motions for new trial, and a wrong reference to the section of the Act, which should be sec. 58, and not sec. 8; and at p. 120, the office of Counsel for the Poor is said to be held for "three" years instead of one year. Again, it is not quite an accurate statement which is made at p. 200, that possession on a written title is necessary for a possessory judgment. In right of way cases, for instance, a possessory judgment may be obtained without any written title. See the cases of *Calder v. Adam*, March 2, 1870, 8 Macp., and *Gordon v. M'Kerron*, Feb. 15, 1876, 13 Sc. L. R. 279. In one or two instances, also, the most recent decisions have not, it seems to us, been referred to. Why, for example, at p. 370, is the important case of *Auld v. Shairp*, December 16, 1874, II. R. 191, not noticed, in stating the rule that an action for damages and solatium on the ground of injury by the defender is competent to the representatives of the person injured? We must also protest against the plan adopted by Mr. Mackay of referring to the Reports

of Macpherson by a simple *M*. This reference has been dedicated by long prescriptive use to Morrison's Reports, and it only tends to confusion to have both sets of reports with the same significant letter. We have little doubt that it contributed, in some measure, to a reference by Mr. Mackay (p. 250, note) to the old case of *Robertson v. Preston* as being decided August 11, 1870, M. 7465. Macqueen and Murray have as much right to *M*. as Macpherson. These, however, are slight blemishes. Looking at the book as a whole, we do not doubt that its comprehensive spirit, and no less commendable accuracy in details, will secure for it the desired favourable reception. It is certainly a work which no person who has anything to do with the Practice of our Supreme Courts can afford to do without.

Obituary.

ROBERT HORN, ESQ., DEAN OF FACULTY.

It is our melancholy duty to record the death of this much respected gentleman, which took place at his house in Randolph Crescent, on the morning of Wednesday the 2nd January last. On the evening before the Christmas recess, Mr. Horn presided at the annual dinner of the office-bearers of the Faculty, and those who heard him, in a voice stifled with emotion, feelingly declare "that the kindness he had received from the Faculty would be carried with him to his grave," little thought that those words, the last he spoke in public, were so soon to be thus solemnly realized. On Christmas Day he was in better health and spirits than usual, but a cold, caught that afternoon, brought on congestion of the lungs, which, after a week's illness, ended fatally. He retained presence of mind and kindness of heart to the end, and seemed anxious to spare the sufferings of others by concealing his own. On his death-bed he had the comfort and consolation of being ministered to by the wedded companion of forty years, and of closing his eyes in the presence of a loving and united family. Since death must come, what happier death could be wished for? what more fortunate close to a long and honourable career? He had had the full enjoyment and honours of life, and was spared the ills and infirmities of age.

Robert Horn was the youngest of three sons born of the marriage of William Horn and Jeane Headrick, a lady of Danish descent. His father was a considerable well-to-do farmer in the neighbourhood of the Bridge of Allan, and his son, Robert, was born there on 24th May 1810. How far the beautiful scenery of his birth-place and boyhood, the woods of Keir and romantic banks of

Allan Water, the *Freedom*-flowered field of Bannockburn; the high rock and weather-worn castle of Stirling, overlooking the links of Forth and the magnificent prospect of Highland mountains that

"like giants stand,
To sentinel enchanted land,"

influenced his mind, and instilled that early love for the beautiful in nature and art which became a conspicuous feature in his character, we shall not stop to determine. It is enough to say that in him, as with others, "the child was father of the man;" and the affection and appreciation which the old lawyer and Dean of Faculty afterwards felt and showed for the far-famed Pass of Glen Lyon, and other picturesque parts of Scotland in which it was his privilege to dwell, had its origin and inspiration in the happy surroundings of the locality of his childhood.

Young Robert was sent to the Grammar School of Stirling, and took kindly to his letters. At the age of eleven he passed to the High School of Glasgow, and thereafter to the University in that city, where he remained for several years, diligently devoting himself to his studies, and especially to mathematics. At each of those seminaries he won prizes and honours, and, what was even more praiseworthy and delightful in after years, made and retained through life the friendship of three boys, who, when they grew up to manhood, became distinguished as Sir George Harvey, President of the Royal Scottish Academy of Painting; Dr. John Muir, D.C.L.; and Archibald Campbell Tait, Archbishop of Canterbury.

Resolving to follow the legal profession, young Horn came to Edinburgh and entered himself as a student in the law classes of the University, taught by Professors Joseph Bell and Macvey Napier, during the years 1830 to 1832. He took copious notes of the lectures, and proved so apt a scholar that he carried off the first prize for Civil or Roman law, though he had for competitors such ardent students, among others, as Lord Moncreiff and the late Thomas Lord Mackenzie.

Besides studying the theory, he also, we believe, spent some time in an office to learn the practice of law and conveyancing; and thus carefully educated and trained for the career he was to enter upon, he passed at the bar in 1834, with as bright a prospect of success and as hopeful an outlook as most men.

To complete the course of study, however, which he had chalked out for himself, and to gain a knowledge of continental languages before entering on the practice of his profession, he went abroad for a year, travelling in France, Germany, Italy, and Sicily, and made such good use of his time that he not only became tolerably proficient in the French, German, and Italian tongues, but contrived to acquire a knowledge of, and make himself more than ordinarily acquainted with, whatever was best worth seeing and studying in the chief art-galleries of Italy. At Rome he frequented the studio of Thorswalden, became, through Professor Blackie, intimate with

Bunsen, and met many other eminent men, among others Monsieur Thiers. Thus far the young advocate's life was a happy one, and though plain, practical agents and friends at home might think he was forgetting his law and idling his time among the relics and ruins of Rome, he was, in reality, improving his mind in a way it would be well if many more young advocates would imitate, and fitting himself, in a not unsuitable manner, for the practice of a noble profession and the enjoyment of a virtuous life. Few youths of his age ever got a more thorough education, and it speaks volumes to the foresight, frugality, and kindliness that harboured under the parental roof.

Soon after his return from the Continent, he, in 1836, married Miss Galbraith, the daughter of a Glasgow merchant, through whom he ultimately acquired a large fortune. This, however, did not deter him from devoting himself to his profession with zeal and assiduity. He loved it too well to give it up, as too many favourites of fortune have done, for the questionable pleasures and indolence of a country life. Well read in law, and painstaking in everything he did, he got into a large junior practice, which he might easily have increased had he been less scrupulously conscientious than he was in the conduct of his cases. As a counsel his written pleadings were better than his spoken style. In his opinions he was clear, forcible, neat, and concise; while in debate he was apt to be too diffuse, and overlaid with detail. Lord Colonsay, who knew him well, thus spoke of him in the House of Lords: "The learning, acumen, and abilities of Mr. Horn were qualities for which those who have been accustomed to hear him know him to be distinguished." A remarkable instance of his acuteness happened some years ago, when, through the strength of his legal opinion, the members of the *Speculative Society*, though threatened with expulsion by the *Senatus*, were enabled to maintain their right to their old historical rooms. For this service Mr. Horn was made an honorary member of the Society, an honour which, owing to its rarity, and as coming from young men, he highly prized.

Like George Graham Bell, George Webster, and others, he was among the last of that polite, rare, and now almost extinct, class of chamber counsel, to whom agents in their need resorted for advice on some knotty point of conveyancing, or to unravel the intricacies of some incomprehensible family settlement. In such cases Mr. Horn was invaluable. So long as he was doing his duty to his client he set no value on time, and long, irksome work, from which most men would have shrunk, had for him the pleasure and excitement others derive from a nightly plethora of cases and daily bustle of the Courts.

His inability to pass half-done work from his hands, or to glide glibly over it, kept him behind, and over-weighted him in the race which others were running for professional distinction. A Whig in politics, but too manly to fawn, and too independent and shy

to sue for office, he held on the even tenor of his way unfriended by party, and not seemingly disconcerted when he saw men junior to himself climbing the official ladder that leads to the bench. The Sheriff-Principalship of Fife was, we believe, offered to him by Lord Advocate Young, but politely declined.

But Mr. Horn was something more than a mere lawyer, and had a character of his own apart from his profession. A well-read gentleman, a good classical scholar, he took a lively interest in, and had a wonderful *dilettante* knowledge of, all that was going on in the world of art and letters. Ruskin, Blackie, Hill Burton, Hossack, and Theodore Martin, were his most intimate friends, and the last-named gentleman showed the value he set on his judgment by intrusting to him, as Macaulay did to Jeffrey in a similar way, the correction of the proof-sheets of the last volume of his admirable "Life of the Prince Consort."

In Edinburgh, as at Rome, he spent much of his time in the studio of artists, helping on many, and living on brotherly terms with most of the Scottish Academicians. He delighted to encourage young men, and seemed to prefer their society to that of those of his own age.

As a citizen he took an active share in many of the public questions of the day, including the Reform and Endowment of the Universities, the Art Manufacture Association Exhibitions of 1856 and 1857, and the Scott Centenary and Raeburn Exhibition of Paintings, and never let his private practice or self-interest conflict or interfere with his duty to the public. In 1866 he was appointed by the Queen a Commissioner of the Board of Manufactures, and in that year delivered the annual address to the students of the School of Design. In reading it one sees how deeply he drew upon his early studies on the Continent, and how the impressions on Art then formed had become confirmed by subsequent study and reflection.

The chief defect and peculiarity of his character—for he had his defects and peculiarities—was a fatal facility of speech, or, as Carlyle said, a curious mode of running many sentences into one. In conversation he needed a good listener, and in the company of Carlyle this was simply impossible. But without this, and a certain undefinable rigidity of manner, he would not have been what he was, the tall, spare, prim-faced, aged, but ever young-looking Robert Horn, the kindly courteous gentleman, and upright, high-minded lawyer. It was the knowledge of this, and in recognition of his great services to the Faculty of Advocates in connection with their library and especially its printed Catalogue, that the Faculty were induced, in 1874, to appoint him *Vice-Dean*, and ultimately, in 1876, to elevate him to the still higher office of *Dean of Faculty*. It is unnecessary to say how well he discharged his duties in this position, and how proud he was of the office. The possession of it consoled him, as it may others, for any rebuffs he had met with from

his party, as well as for that longing, lingering, looking forward to the Bench and hope deferred, which, sometimes, maketh the heart sick. He had also other and higher consolations on which we will not enter.

Looking back on his career we see clearly that his love for art and the beautiful in nature had its beginning in boyhood, and was no youthful, fleeting emotion, but a daily want and craving of his nature, which, both for his own delight and that of others, he was able to gratify. The walls of his house were hung with some of the master-pieces of Scottish art; Raeburn, Nasmyth, Thomson, M'Culloch, Roberts, Harvey, Herdman, Noel Paton, Erskine Nicol, Cameron, M'Whirter, Sam Bough, and others being well represented. As already stated, Sir George Harvey was one of his Stirling school-fellows, and it was no ordinary pleasure to see the grey-headed President and other members of the Academy sitting at the social board of his early benefactor and friend, surrounded by his own paintings and the beautiful creations of his brother artists. But this shall be no longer. The pictures remain lovely as before, but the banquet of life is over, and the guests and the host have departed. The "sleeping and the dead are but as pictures." It is even so. Such shadows we are, and such shadows we pursue.

HUGH BLAIR, Esq., Auchenreoch, W.S., died on 6th January. Mr. Blair was the son of a Writer to the Signet, and was born in 1806. He himself was admitted to the profession in 1827, and, as a partner of the firm of Messrs. Hunter, Blair, and Cowan, was for many years well known and highly esteemed in legal circles in Edinburgh. The deceased gentlemen had been a Deputy-Lieutenant for the Stewartry of Kirkcudbright, where his patrimonial property of Auchenreoch was situated, since the year 1830. He married a daughter of Mr. Patrick Sanderson, one of the partners of Sir William Forbes and Co.'s Banking House. He is survived by that lady, and by three sons, one of whom is one of the Advocates-Depute under the present Government.

JAMES THOMS ANDERSON, Esq., Advocate and Barrister-at-Law, died on the 17th January. He was admitted to the Scottish Bar in 1856, and practised successfully for some time. He eventually was called to the English Bar, and for some time enjoyed a considerable practice at Westminster, especially before Parliamentary Committees. Last year, however, he determined again to resume his Scotch practice, and his legal brethren welcomed him once more to the boards of the Parliament House. His health did not allow him to continue long there, but few of his many friends thought that they would so soon be called on to mourn the loss of an amiable and accomplished gentleman.

THOMAS LEES, Esq., Solicitor.—The death is announced of Mr.

Lees, the respected Town-Clerk of Musselburgh, on the 18th January. The deceased gentlemen was born in Galashiels in 1800, and studied the practice of the Law. He commenced business at Musselburgh, and for some time was Procurator-Fiscal there. He was appointed Town-Clerk in 1844, and was also agent for the Royal Bank. Universally esteemed by all with whom he came in contact, his loss will be widely mourned.

GEORGE THOMSON, Esq., Advocate.—We have to record the death, on the 18th January, of Mr. George Thomson, who, though not well known among the practising lawyers at the Parliament House, yet was brought much into contact with the leading men of his day. Born on his ancestral estate of Burnhouse in Mid-Lothian, he was called to the Bar in 1835, along with Lord Gordon of Drumearn and the present Lord Justice-General. Possessing a competent private fortune of his own, he never pursued the practice of his profession, but in 1852, when Mr. Inglis became Lord Advocate, he appointed Mr. Thomson his private Secretary, an office which he continued to hold under Mr. Baillie (Lord Jarviswoode), and Mr. (now Lord) Mure. Of excellent business habits, he performed the work of the office in a very satisfactory manner, and the political knowledge he then acquired often proved of much service to his party. Courteous and genial in manner, he has left many attached friends to mourn his loss.

JAMES HOZIER, Esq. of Newlands, Advocate.—The ranks of the veterans of the Scottish Bar are being sorely thinned. We have this month the regret to notice the death of the above-named gentleman, who stood third on the list of surviving advocates, having passed to the Bar in 1815. He was a Deputy-Lieutenant of the county of Lanarkshire, and for some years was Convener of the county. Mr. Hozier died on the 13th January, aged 85.

JAMES CHARLES MURRAY, Esq., W.S. (1848), died on 22nd January.

The Month.

The New Dean of Faculty.—At the Anniversary Meeting of the Faculty of Advocates, held on the 16th January, on the motion of Sheriff Lee, seconded by Mr. A. S. Kinnear, PATRICK FRASER, Esq., LL.D., was unanimously elected Dean of Faculty in place of the late Mr. Horn. Mr. Fraser returned thanks for the high honour bestowed on him, and on the following morning was introduced to the Court in

his new capacity, and welcomed by it to the usual position of the Dean in the centre of the Bar. It would not be befitting to let the election of Mr. Fraser pass over without a word of congratulation in the pages of the *Journal*, which owes much of its present success to his personal services. From its commencement, as we noticed in our number for last December, he has taken the warmest interest in its welfare, and his learned and valuable contributions have tended not a little to the reputation which this magazine has enjoyed among the legal profession in Scotland. Admitted to the Bar in 1843, Mr. Fraser fought his way upwards in the ranks of his profession by the force of his ability alone, and assisted by no adventitious aids. His earlier years at the Bar were marked, as he himself said when addressing the Faculty on his election to the Deanship, by chequered lines; the verbal promise of each year too often gave place to autumnal disappointment. Able, however, as Mr. Fraser is as a forensic speaker, it is in the literature of his profession that he has gained most fame. To the readers of this magazine his famous works on the Personal and Domestic Relations are well known. Not only in Scotland is his learning fully recognised, he is one of the few legal authors of this country who has made his influence felt beyond it. Both a deeply and widely read scholar, his knowledge extends to other subjects besides that of law. We have before us a little volume published many years ago containing several articles contributed by Mr. Fraser to the *North British Review*, containing a series of strictures on Tytler's "History of Scotland." These papers show an acquaintance with Scottish history, and a perception of its true meaning and lessons, which do great credit to the writer. Among other of Mr. Fraser's writings we may mention a little *brochure*, entitled "The Conflict of Laws in Cases of Divorce," which was highly praised on its appearance, and fully sustains the reputation of its author as a consistorial lawyer. In 1862 Mr. Fraser was appointed Sheriff of Renfrewshire by the Government of Lord Palmerston; and in 1871 the University of Edinburgh bestowed upon him the degree of LL.D.

It is perhaps worthy of mention that, until the recent lamented death of Mr. Horn, no Dean of Faculty had died while holding that office since 1823, when Mr. Matthew Ross, of whom the late Mr. Scott Moncreiff has left such an amusing sketch, died.

Candlemas Recess.—The usual breathing space in the middle of Session will be afforded hard-worked counsel and busy agents by the Court adjourning for the statutory week in February. The Court will rise on Saturday the 9th, and resume its sitting on Tuesday the 19th. Lord Curriehill will be the Lord Ordinary on the Bills during the week.

The Glasgow Magistrates and their Procurator-Fiscal.—The *Scotsman* reports the following scene as occurring at the Police Depart-

ment of the Glasgow Town Council on the 24th December last, the subject before it being the "enterprise" salerooms, which the magistrates wished to put down by *civil* process as lotteries:—"Bailie Wilson said he regretted very much that the 'enterprise' fraternity had not been put down. He did not know who was to blame for the delay, but he was bound to say it was not the fault of the officials of Glasgow. Since the subject of these sales had been called attention to, the owners of these places had been redoubling their efforts. Now he wished to ask, Could they not at present interdict these places from being opened, at all events until the New Year holidays were over? It seemed to him very strange that these places had been put down in all the principal towns in Scotland except Glasgow. These places were nightly thronged by crowds, he might almost say, of insane persons. He thought the Lord Provost might venture to put the 'enterprise' business down with a strong hand. Mr. Martin asked if it were in the power of the authorities to put down these salerooms without putting down bazaars? He could produce many facts to show that the one was as bad as the other. Mr. Lang, Fiscal, said the matter was now in the hands of the Lord Advocate and the Crown authorities, who were the only competent parties to deal with it. Bailie Wilson was sorry indeed to get that answer, and he was sure the magistrates and the citizens of Glasgow would likewise be sorry to hear that these places could only be put down by the Crown authorities. Bailie Lamberton wanted to know, if that were the case, how these places could be put down in other towns? Mr. Lang could not answer that question; he simply stated what was the fact." Mr. Lang the Fiscal's fact is curious, that the Lord Advocate and Crown authorities were the only competent parties to deal with the evils of which his employers, the magistrates, complained. It is opposed to the decision in *Fraser v. Sprott*, 7th July 1796, M. 9524. There Sprott, then "the Procurator-Fiscal of the city of Edinburgh, was the petitioner, whose title was sustained, and (the Glasgow magistrates evidently knew not this), what is more, he applied for and got interdict from his own magistrates against "Fraser, a jeweller and hardware merchant" who had "advertised a scheme of lottery for disposing of his goods." The Lord Advocate and Crown Counsel have no jurisdiction or responsibility in the matter, while the magistrates have both. Well may the community ask to know the use of local magistrates if they be ignorant of their powers and responsibilities, both as regards the community and the magistrates' own servant, their Fiscal, who should take his orders and obey them. One thing is evident,—neither magistrates nor Fiscal have read the articles which have appeared monthly in this *Journal*, since January last year, on the office of a Procurator-Fiscal!!

An Illiterate Justice.—A correspondent of an American journal gives the following decision, lately rendered by a justice of the

peace, which he thinks is too good to be lost. That readers may fully understand the case, and appreciate the decision, he gives a brief statement of the case. Cole & Brother brought suit against Wm. Biddle in attachment, before a justice of the peace of the city of Keokuk, obtained a judgment and had execution issued and levied on a field of corn, and one corn-planter. Biddle commenced a suit in detinue against the constable who made the levy and Cole & Brother. The judgment is as follows, to wit:—"Mr. Coals and Brothers Mi Dessishern is that your jugmet is good But they attachment Wont Hold good according to they Law Laid down in statue that is Mi Dessishern in this case. L. PICKARD, J. Pease Lee Co Iowa this November 11th 1877, and Mi Dessishern on Dameg is 5 dols, furr Rongfull Detance of goods and chattels.—L. PICKARD, J.P."

A Costly Liquidation.—A parliamentary return has been issued of the sums paid to the arbitrators, assessor, liquidators, and solicitors respectively under the provisions of the European Society Arbitration Act, 1872, and of the other expenses of the arbitration. It appears that the sums paid were, to arbitrators, £6562, 10s.; to assessor, £4725; and to liquidators, £18,666, 13s. 4d. Under the heading "other expenses of the arbitration" we find an entry of £6757, 8s. 4d. for secretaries and clerks of arbitrators and assessor, and one of £29,525, 19s. for clerks of liquidators. There is under the section "Expenses incurred in liquidation in the Court of Chancery" an entry of European Assurance Society, £18,841, 8s. 7d. In a table which gives the amount of the debts proved or audited, the number of claims on life policies and annuities in the European and other societies absorbed by it was 22,207, and the total amount £1,773,962, 11s. 2d.; and of other liabilities there were 184 claims and a total amount of £41,402, 10s. 6d. The number of contributories in all the companies who have compounded was 793, and the number who are insolvent or cannot be found is 2188. The amount of dividends paid to the creditors of the European Assurance Society was 4s. 6d. in the pound.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFFDOM OF ROSS, CROMARTY, AND SUTHERLAND.

Sheriff-Substitute SPITAL.

Merchant Shipping Act, 1854, sec. 319—Board of Trade Certificate—Passengers, number of—Penalty—Sheriff.—The master of a steamship plying betwixt parts in Scotland fined for carrying more passengers than allowed by the vessel's certificate, and plea of use and wont in contravention of the statute repelled.

This was a complaint brought by the Procurator-Fiscal of the Sheriffdom of

Ross-shire at Stornoway against the master of a steamer carrying both passengers and goods between Glasgow and Stornoway, and other ports in Scotland, for contravening section 319 of the Merchant Shipping Act of 1854, by carrying a larger number of passengers in excess of the number allowed by the vessel's certificate. The Sheriff-Substitute held the complaint proven, and inflicted the mitigated penalty of £5. The circumstances of the case, and the pleas of parties, are fully explained below.

The Sheriff-Substitute, in giving judgment, said—

"28th November 1877.—By section 304 of the Merchant Shipping Act, 1854, it was enacted that 'every passenger steamer shall be surveyed twice at the least in each year in manner hereinafter mentioned.' That section was repealed by section 8 of the Amending Act of 1872, which enacted that 'every passenger steamer shall be surveyed *once* at the least in every year in the manner mentioned in the fourth part of that Act' of 1854.

"By section 305 of the Act of 1854 the Board of Trade is empowered to appoint shipwright and engineer surveyors; and by section 309 it is enacted that the owner of every passenger steamer shall cause the same to be surveyed by one of each of these classes of surveyors. The declaration of the shipwright surveyor, after he has satisfied himself on the subject by examination of the steamer, shall contain, *inter alia*, a statement of the 'number of passengers which the ship is, in the judgment of that surveyor, fit to carry, distinguishing, if necessary, between the respective numbers to be carried on the deck and in the cabins, and in the different parts of her deck and cabins; such numbers to be subject to such conditions and variations, according to the time of year, the nature of the voyage, the cargo carried, or other circumstances, as the case requires.'

"Section 310 enacts that the owner shall transmit the surveyor's declarations to the Board of Trade within fourteen days after receipt of the same; and section 312 enacts that 'upon the receipt of such declarations the Board of Trade shall, if satisfied that the provisions of the 4th part of this Act have been complied with, cause a certificate in duplicate to be prepared and issued, to the effect that the provisions of the law with respect to the survey of the ship, and the transmission of declarations in respect thereof, have been complied with; and such certificate shall state the limits, if any, beyond which, according to the declaration of the surveyor, such ship is not fit to ply, and shall also contain a statement of the number of passengers which, according to the declaration of the shipwright surveyor, such ship is fit to carry, distinguishing, if necessary, between the respective numbers to be carried on the deck, and in the cabins, and in different parts of the deck and cabins, such numbers to be subject to such conditions and variations according to the time of year, the nature of the voyage, the cargo carried, and the circumstances, as the case requires.'

"By section 34 of the Merchant Shipping Amendment Act, 1862, this certificate remains in force for six months; but it appears that by a Board of Trade circular the duration of these certificates is extended to one year. A copy of this certificate, when obtained by the owner, is, by section 317 of the Act of 1854, to be put up in some conspicuous part of the ship, so as to be visible to all persons on board the same.

"The steamer *Clydesdale*, a large and powerful vessel belonging to Messrs. D. Hutcheson & Co. of Glasgow, usually plying between Glasgow and Stornoway, calling at various intermediate ports on her outward and inward voyages, and carrying both goods and cargo, was duly surveyed in terms of the Act in the spring of this year, and a certificate, dated 31st March 1877, was issued by the Board of Trade, to remain in force, if not cancelled, till 27th March 1878, empowering her to carry in all 381 passengers between 1st April and 31st October, and 280 passengers between 1st November and 31st March; certain conditions being attached in the event of any portion of the passenger space being occupied by cattle or other cargo.

"A complaint is now presented by the Procurator-Fiscal at Stornoway against Daniel MacIachlan, master of the *Clydesdale*, charging him with having, on 11th July last (1877), carried 1363 passengers from Stornoway to Thurso, thereby contravening section 319 of the Act of 1854, which enacts that, 'If the owner or master, or other person in charge of any passenger steamer, receives on board thereof, or on or in any part thereof, or if such ship has on board thereof, or on or in any part thereof, any number of passengers, which, having regard to the time, occasion, and circumstances of the case, is greater than the number of passengers allowed by the certificate, the owner or master shall incur a penalty not exceeding twenty pounds, and also an additional penalty not exceeding five shillings for every passenger over and above the number allowed by the certificate, or, if the fare of any of the passengers on board exceeds five shillings, not exceeding double the amount of the fares of all the passengers who are over and above the number so allowed as aforesaid, such fares to be estimated at the highest rate of fare payable by any passenger on board.'

"The plea tendered in defence by the master amounted to a plea of *not guilty*, as while he admitted carrying upwards of 1300 passengers on the occasion in question, he denied having contravened the 319th section of the Merchant Shipping Act, 1854.

"The case accordingly was remitted to proof. The prosecutor produced a copy of an advertisement issued by Messrs. Hutcheson & Co., in June 1877, running thus:—'Steam communication. Stornoway to Scrabster Roads, Thurso, calling at Lochmaddy and Tarbert-Harris for passengers on Wednesday morning the 11th July. Steerage fare, 3s. The steamships *Clydesdale* and *Clansman* are intended to leave Stornoway for Scrabster Roads on Wednesday the 11th July and on Saturday the 14th July. Steerage fare, 3s. David Hutcheson & Co.' And, by the evidence of the clerk of the steamer and others, it was clearly proved that on 11th July 1877 the *Clydesdale* did carry from Stornoway to Thurso 1313 or thereby passengers, at least some of whom got on board the steamer at Lochmaddy and other ports of call, while about 1000 embarked at Stornoway.

"It farther appeared in the course of the proof that in June 1854 the Messrs. Hutcheson applied to the Board of Trade, or the department in whose power the matter lay, for, and obtained, special permission for their steamer *Chevalier* to sail from Stornoway to Thurso with a greater than the usual number of passengers. The permission, a copy of which is produced, is dated 16th June 1854, and is thus expressed:—'Gentlemen, I am directed by the Lords of the Committee of Privy Council for Trade to acknowledge receipt of your letter of the 8th inst., and in reply am to inform you that there will be no objection to allow the *Chevalier* to carry as many passengers on deck and below as she can stow, provided there be 9 square feet to each person, and that the accommodation below is properly ventilated and lighted, and that her deck space is substantial and fixed, and that these arrangements are approved by the shipwright surveyor.' That permission was applied for on the ground of benefit to fishermen, who would in that way be conveyed at a cheap rate to the east coast fishing, and more safely and expeditiously than in their own open boats. That permission, however, it must be observed, was granted before the passing of the Merchant Shipping Act of 1854, which was passed on 10th August 1854, and only came into operation on 1st May 1855.

"It does not appear that the Messrs. Hutcheson at any subsequent time applied for or obtained any similar permission, either for the *Chevalier* or any other steamer. The *Clydesdale* admittedly does not, and never did, hold any such special permission.

"It was alleged, however, in defence, that the same reason for the cheap and speedy conveyance of fishermen to the east coast exists now as existed in 1854; that the owners of the *Clydesdale* thought themselves warranted in acting on the spirit of their special permission of 1854; that they and the owners of other steamers have for many years been in use to carry similar large numbers of

fishermen to and from the east coast fishing without special authority, and without complaint or remonstrance of any kind on the part of the authorities, although the practice was well known and openly indulged in; and, specially, that when their agent and master were warned at Stornoway on 11th July of the danger and impropriety of proceeding to sea with so many men on board, they found it absolutely impossible to lighten the ship, the fishermen having rushed on board in defiance of the authority of the men in charge of the vessel, while all that the Superintendent of Police felt it safe to do on being asked by the agent to interfere, was to persuade some of the fishermen to leave the upper and to occupy the lower decks, thus avoiding to some extent the risk of top-heaviness. And it was contended in point of law, that 'having regard to the time, occasion, and circumstances of the case'—the time being July and the weather being calm, the fishermen being greatly benefited by the cheapness and speed of the trip, and such trips being sanctioned by long custom without complaint, section 319 of the Act of 1854 had not been contravened.

"The question being now in this Court, I inquired if there had been any authoritative interpretation of section 319 in a Court of Law in Scotland or England. None such being produced on either side of the bar, it becomes necessary to construe the section by examining its own terms, and by seeing if any light is thrown upon its meaning by other sections of the same Act or of any of the amending Acts.

"Now, if the 319th section had simply enacted, 'by having on board any number of passengers greater than the number allowed by his certificate,' the owner or master incurred a penalty, there would have been no difficulty. The section would unquestionably, in the present case, have been contravened.

"But the section says, 'any number of passengers which, *having regard to the time, occasion, and circumstances of the case,*' is greater than the number allowed by the certificate.

"Now, taking this section by itself, these words, 'having regard to the time, occasion, and circumstances of the case,' might be held to imply that a passenger steamer may at times have on board a greater number of passengers than the number allowed by the certificate, while yet the section is not contravened; the excess being justified by the 'time, occasion, and circumstances of the case.' Suppose this case, that the *Clydesdale* had sailed from Stornoway for Thurso on 11th July, with her exact summer complement of 381 passengers, and that, off Cape Wrath, she met with a disabled and sinking vessel, having a dozen or twenty men on board in imminent danger of losing their lives by shipwreck. If the master of the *Clydesdale* takes these men on board, he undoubtedly carries, for the remainder of the voyage, a 'greater than the number of passengers allowed by the certificate.' But is it greater, 'having regard to the time, occasion, and circumstances of the case'? If he refused to take the men on board, and they are, in consequence, drowned, he would probably, and very properly, be prosecuted for manslaughter. But it is argued by the prosecutor that these words, 'time, occasion, and circumstances of the case,' merely refer to the double form of the vessel's certificate, one number of passengers being allowed in summer, and a smaller number in winter. If so, apparently the section would have been as well without these words, 'having regard to the time, occasion, and circumstances of the case,' and as if it had simply run, 'greater than the number of passengers allowed by the certificate.' For, in any case of alleged contravention of section 319, the certificate would be produced, proof would of course show, first, how many passengers were admissible at the time of the alleged contravention, taking into account the cargo, time of year, and so on, all as mentioned in the certificate; and, second, whether the number of passengers had exceeded the prescribed number on the date in question.

"But other sections of the Act of 1854 shed some light on the question.

"Section 309, as we have seen, enacts that the declaration of the shipwright surveyor shall contain, *inter alia*, a statement of 'the number of passengers which the ship is, in the judgment of the surveyor, fit to carry, . . . such

numbers to be subject to such conditions and variations, according to the time of year, the nature of the voyage, the cargo carried, or other circumstances, as the case requires.' And by section 312 the certificate, issuable by the Board of Trade on receipt of such declaration, shall 'contain a statement of the number of passengers which, according to the declaration of the shipwright surveyor, such ship is fit to carry, . . . such numbers to be subject to such conditions and variations, according to the time of year, the nature of the voyage, the cargo carried, and other circumstances, as the case requires.' The phraseology here being the same as in the 309th section ; but not the same as in the 319th section.

"Thus the elements to be taken into consideration in granting certificates to passenger steamers are, 'the time of year, the nature of the voyage, the cargo carried, and other circumstances;' while, in considering whether or not the penalty set forth in the 319th section has been incurred, the point for consideration is, whether, 'having regard to the time, occasion, and circumstance of the case, the number of passengers carried is greater than the number allowed by the certificate?'

"Apparently in the ordinary case, steamers like the *Clydesdale*, carrying as a rule both passengers and goods on regular voyages all the year round, are licensed simply for two definite numbers of passengers, one number for the summer months, and another and smaller number for the winter months. That is, the number of passengers is subject to 'conditions and variations according to the time of the year, the nature of the voyage, the cargo carried, and other circumstances.' Whatever these may be, they are apparently presumed to be uniform and constant, as, no doubt, they generally are, and therefore there is no provision in the certificate for the carrying of a greater number of passengers in exceptional circumstances, as, for instance, in the case of a pleasure trip, where there is little or no cargo on board. But it would seem that the shipwright surveyor might, if requested, and if he thought fit, report that much of the cargo space might, on occasion, be devoted to passengers, thus admitting of the vessel carrying some hundreds more passengers than usual, in respect that her usual amount of cargo was not on board. By re-arrangement of space the number of passengers might be indefinitely varied. Although both the *Clansman* and the *Clydesdale* ply weekly between Glasgow and Stornoway during the greater part of the year, yet, as is well known, only one at a time plies during one or two of the winter months. When the *Clydesdale* is temporarily off the route she might probably be used simply as a passenger steamer, and be licensed to carry many more than her present winter complement of 280. And accordingly we see that, in 1854, the Committee of Privy Council for Trade did give a special permission to Messrs. Hutcheson to carry on board the *Chevalier* as many passengers as she could stow, on the conditions specified and narrated above.

"Unfortunately, in the present case, there is no such special permission. The *Clydesdale's* certificate only names two numbers of passengers, one number for summer, and another number for winter, no mention being made of any special trips, when, by absence of cargo, the space usually devoted to cargo might be made available for an increased number of passengers. On the motion of the respondents' agent the case was adjourned from the first hearing till this day, in order that a report might be furnished by Messrs. Hutcheson of how many passengers might safely be carried on the principle laid down in his special permission of 1854. That report is now before us, and, according to it, the *Clydesdale* could accommodate 1683 passengers in the absence of cargo, i.e. 370 more than the number actually carried on the trip complained of. This report, although, of course, not authoritative, is yet, assuming it to be correct, interesting, as going to show that, apart from the question of contravention of the 319th section, the *Clydesdale*, on the trip now in question, might have carried with safety even more passengers than she did, always supposing, of course, that these passengers were properly stowed so as to avoid top-heaviness, the great danger in such a voyage.

"On a view of the whole case, I am constrained to hold, on a construction of the various clauses of the Merchant Shipping Act, to which I have referred, that the present complaint is proven, and that the master of the *Clydesdale* did on 11th July 1877 contravene the 319th section of the Act of 1854. Whatever might be the law where, as in the case supposed, the master took on board passengers in excess of the number permitted by the certificate for the purpose of saving their lives, whether, *having regard to the time, occasion, and circumstances*, that would amount to a contravention of section 319 or not, here the taking on board of an excessive number of passengers was undoubtedly done deliberately, not to save the lives of any of them—rather, it may be said, to the endangering of their lives,—but merely to save their pockets. And I think it would be dangerous to hold that the owners of passenger steamers were themselves to be judges of the 'time, occasion, and circumstances,' under which they would elect to carry more than their certified number.

"But although I am of opinion that the Act has been contravened, I think this is quite a case for mitigation of the penalty. In giving the penalty I think it is right to take into consideration that for many years the practice of taking large numbers of fishermen to and from the East Coast has been carried on without any remonstrance from the authorities. If any accident had happened on these occasions, probably we should have had this question tried before now; but, fortunately, all these trips have been conducted in safety. I think it is well, however, that this complaint has been brought, and that the Collector of Customs should have warned the master, as he did, of the consequences of contravening the 319th section of the Merchant Shipping Act, for this case will no doubt check a practice which, to say the least of it, was not unattended with danger.

"Then it is clear also that the large number of passengers carried on such trips enabled the owners to carry them at a small fare, a great boon to the many fishermen who go yearly from Lewis to the East Coast in prosecution of their calling.

"Further, in the present case it is clear that it was out of the power of the authorities of the steamer, or of any one else, to restrict the number of passengers to 381. It was proved that the men rushed on board without permission, and, once on board, they could neither be persuaded nor forced to go ashore. The Superintendent of Police, on being appealed to by the steamer's agent, went on board, and persuaded a number of them to go below. More it was impossible to do. On the other hand, of course, it must be remembered that the owners were, in the first instance, responsible for the large number of passengers, for they had specially advertised the trip, and no doubt expected that large numbers of them would avail themselves of it, as they had done on previous occasions.

"And with regard to the defence that the fishermen would not leave the vessel when once they got on board, it may be pointed out that section 395 of the Amending Act of 1862 gives the owner a remedy for that by enacting that persons forcing their way on board after being lawfully refused admission, or refusing to leave the vessel after being lawfully requested to do so, render themselves liable in a penalty not exceeding forty shillings. It does not appear that any of the 1313 passengers of 11th July have been proceeded against under this section.

"In the whole circumstances I think that the ends of justice will be attained by mitigating the penalty to £1, 2s. 4d., with an additional penalty of one penny for each of the passengers carried in excess of the lawful number, amounting in all to £5.

"This is a merely nominal penalty, but, in my opinion, a nominal penalty is all that ought in this case to be inflicted.

"The Messrs. Hutcheson and other steamboat owners may be trusted to take in future such precautions as will prevent the necessity of similar complaints hereafter; while, at the same time, means may be devised whereby fishermen may still be conveyed cheaply, and also safely, to and from the East Coast—
"ing."

SHERIFF COURT OF LANARKSHIRE, GLASGOW.

Sheriffs GUTHRIE and CLARK.

J. & J. MACDONALD v. THE PORT DUNDAS SUGAR REFINING CO. LIMITED.

Bankruptcy—Act 1696, c. 5—What constitutes illegal preference.—The interlocutor and note fully explain the circumstances of the case.

Glasgow, 28th March 1877.—Having heard parties, finds that the petitioners bought the parcels of sugar set forth in the account annexed to the sums from the Port Dundas Sugar Refining Company Limited at the prices libelled, which were paid in account between them before the bankruptcy of the said company : Finds that the Act 1696, c. 5, does not apply to the said sales, or to any other transaction between the petitioners and the said company, relative to the said parcels of sugar. Therefor repels the defences, finds the petitioners entitled to delivery of the several lots of sugar set forth in column 4 of said account : and ordains the respondents, within one day from this date, to deliver to the petitioners the said lots of sugar specified in column 4 of the account annexed to the petition with certification. W. GUTHRIE."

Note.—This is a petition for delivery of certain quantities of sugar bought from the Port Dundas Sugar Refining Company by the pursuers, on different dates between 5th August 1875 and 22nd March 1876, and valued at upwards of £3600. The petitioners say that they have paid the prices of these sugars, and are entitled to delivery. The sellers became notour bankrupt on 7th April 1876, and granted a trust-deed in favour of Mr. Wylie Guild, one of the conditions of that deed being that the creditors' interests in the company's estates were to be according to their respective legal rights and preferences, as if there had been a sequestration under the *Bankruptcy Act*, and that the trustee should have power to reduce and set aside all illegal preferences, with the whole powers and privileges competent to a trustee in a sequestration. The trustee has lodged defences to this petition, in which he avers that the petitioners have not paid the prices of the sugars bought on and after 25th Feb. 1876, amounting to £1972, 9s. 6d., and that they are not entitled to delivery of them without making such payment : and he maintains that the sales made after the 25th February, and a settlement between the parties made on 24th March, are null and void, under the Act 1696, c. 5, as having been made within sixty days' of the company's notour bankruptcy, in favour of the petitioners as creditors, for their satisfaction or further security, in preference to other creditors.

"The circumstances under which this question arises have been fully disclosed in the proof, and are not now the subject of controversy. The petitioners are extensive sugar-brokers and merchants in Glasgow, and were in the habit for some years of making large purchases from the Port Dundas Sugar Refining Company at their daily sales. These sales were by auction, were held at the company's counting house in Virginia Street, and were conducted by means of samples. The various lots of sugar offered for sale were lying in the company's store at Port Dundas, and at the time of the sale were separated, and (if that had not been done before) were on the same or next day put into bags or casks ready for delivery. Immediately after the sale, a sale-note was passed to the highest bidder for each lot, bearing following lithographed Note of Terms : 'Cash in 14 days, less 2½ per cent. discount, and in accordance with the rules of our saleroom.' An invoice followed, specifying the weight, containing a similar note of the terms. Slips with the purchasers' names were sent immediately after each sale to the company's storekeeper, and the respective parcels of sugar were forthwith transferred in the books of the store to the names of the purchasers, who thereafter might, and frequently did, operate on them by means of delivery orders. The sugars often remained for some time in the company's store, which, though adjacent to their works, and used for storing their sugars, was also a public store for general goods as well as sugar. At the sale, and in all the documents to which I have referred, each lot of sugar was distinguished by marks and numbers. It was physically separated and

distinguished from all other parcels, weighed and put into bags, so that at the time when the invoice was sent, and the transfer or entry made in the store-keeper's books, nothing remained to be done preparatory to its actual corporeal delivery to the buyer or his sub-vendee.

"The pursuers were accustomed to buy from the bankrupts to a very large extent, it is said as much as £150,000 worth in a year, and it is in evidence that in the last fifteen months of the business they bought sugars to a value considerably above £100,000.

"The great majority of the transactions between the parties passed into a current account in the books of the sellers, and settlements were made from time to time, as shown for the last year in a synopsis (No. 20 of pro.) prepared by Mr. W. T. Duncan, C.A. These settlements were not made at any fixed periods, but apparently just when it was convenient for both parties. Accounts were rendered from time to time, in which the petitioners were debited with the sugar sold at the daily sales, and in which the credit entries consisted, in a few cases, of purchases of raw sugar from the petitioners, but, for the most part, of large payments in cash or by bills made by them, not at the time when the accounts were settled, but from time to time, presumably for mutual convenience. It is an important feature in the case that very frequently (as shown in a statement prepared by Mr. Duncan 21 times between Feb. 5, 1875, and 24th March 1876, a period during which there were 14 settlements, 25 accounts rendered, and 260 purchases), there came in this way to be a large balance at the credit of the pursuers, which constantly decreased as they made purchases. The settlements were generally effected by a cash payment, when there was a comparatively small balance against the pursuer. By far the larger part of the credit entries consists of sums of £1000, or £2000, up to £6000, made during the currency of these accounts. In making up these accounts the condition attached to the sales, that payment should be in cash at fourteen days, was strictly observed, in this sense, that the pursuers in each settlement were charged with interest from the due date (14 days after the purchase) till settlement, and were allowed interest in like manner for the sums which might be paid in advance. All discount on bills was charged against the pursuers. This course of business had continued for five or six years, and there are ample illustrations of it in the settled accounts and invoices produced, and in the statements prepared by Mr. Duncan.

"The question at issue relates to transactions contained in the last settlement (No. 11/30 of pro.) between the parties, which took place on 24th March 1876, about a fortnight before the notour bankruptcy of the Port Dundas Company, and within a week of the time when they disclosed their embarrassments to some of their creditors. That settlement was effected by a cash payment of £117, 6s. 3d. made on that date; but the largest credit entry is a bill at two months for £6000, accepted by the pursuers on February 25. On that day Mr. Doddrell, a partner of the company, requested Messrs. Macdonald to settle their account. They asked if it would do in a day or two. Mr. Doddrell, however, wanted the money that day, and Mr. Macdonald then told him to 'value on them as usual.' The amount of purchases at the petitioners' debit was about £3000, though these were not all due. Mr. Doddrell asked if he should draw for that sum, to which Mr. Macdonald said, 'Oh, just as usual.' Accordingly, the same day, the Port Dundas Company drew on the petitioners for £6000, the petitioners accepted the bill, and the company discounted it, placing the proceeds, less discount, to the petitioners' credit in their books. After this the petitioners purchased sugar in usual course, as shown in 11/30, up till the settlement on March 24th, when, as I have stated, the balance had been turned against them to a small extent.

"Considerable portions of the lots of sugar bought during this period were actually delivered to the petitioners or other assignees, but a large quantity remained in the bankrupts' stores when they stopped payment; and their trustee now maintains, in answer to the claims for delivery, that the sales, as well as the settlement of March 24, are void and null under the Act 1696, c. 5.

He pleads that Messrs. Macdonald, at February 25th, were creditors of the bankrupts, and that every subsequent purchase, as well as the settlement, was a preference over other creditors. This argument applies, in this action, only to the sugar undelivered; but if valid it involves, of course, the respondents' right to reduce the sales even as to the sugar delivered, to the effect of recovering its value, and leaving the petitioners to rank as ordinary creditors for the balance of the bill of February 25, which is applicable to sugars not bought at its date.

"The argument on which the petitioners mainly relied was, that at 25th February an obligation was created by which the bankrupts were not to pay the advance then made to them by the petitioners in money, but by delivering to them parcels of sugar bought at their ordinary sales. Stated thus nakedly, the argument can hardly be maintained (especially after the case of *Gourlay v. Hodge*, June 2, 1875, 2 Rettie 738), because the sugar in which the petitioners' debt was to be liquidated was not then made specific, but remained *in nubibus* till the petitioners had bought certain lots of sugar, and till these were set apart and distinguished. It is quite established that the statutory nullity does not apply to a security granted within the 60 days in fulfilment of an absolute obligation forthwith to give that specific security undertaken at the time of contracting the debt. But the obligation must be one to give a specific security over a particular subject, and the bankrupt must have bound himself to do something immediately and unconditionally, so that he 'subjects himself to an obligation instantly and absolutely enforceable.' This is clearly explained by the Lord President in *Steven v. Scott and Simson*, June 30, 1871, 9 Macph. 923, 932, 933, where the previous cases are cited and explained. This principle was carried much further in the case of *Gourlay v. Hodge*, so far, indeed, as almost to conflict, at first sight, with the judgment of Lord Fullerton in *Gibson v. Forbes*, July 9, 1833, 11 S. 915, 929, *et seq.*, which has since been adopted as the authoritative exposition of the language of the statute. See *Taylor v. Farrie*, 8th March 1855, 17 D. 639, and other cases. The obligation in *Gourlay v. Hodge* was to deliver quantities of grain within a month in liquidation of an advance of £500, and it might have seemed that the delivery of the grain by the bankrupts to their creditor was the natural and stipulated mode of extinguishing the debt, and was not a *satisfaction* of it in the proper sense of that word as used in the statute and defined by Lord Fullerton. But if Lord Fullerton's opinion in *Gibson v. Forbes* (p. 931) be closely examined, we find that he excludes the application of the statute only from a case 'in which the delivery of goods is not made in satisfaction of a prior and separate debt, but is the appropriate and natural payment or extinction of the only debt existing between the debtor and creditor, and necessarily takes effect *independently of any new consent or arrangement between the parties.*' This view, which had been before sufficiently illustrated by decided cases in regard to securities, was in *Gourlay v. Hodge* directly applied to obligations not to give securities, but to pay the debt by deliveries of goods. In this case, as in *Gourlay v. Hodge*, there was clearly a necessity for 'a new consent or arrangement between the parties,' in order to convert the indefinite and general agreement of February 25 into an absolutely enforceable obligation, and that new consent or arrangement took place only when the petitioners bought the particular lots at the auctions. I think, therefore, that the petitioners cannot succeed here merely upon this view of the rule as to *nova debita*, *i.e.* upon the ground that the deliveries of sugar were in implement of a prior obligation, simultaneous with, and forming part of the contract by which the advance was made. Any obligation then existing was not of the kind which, according to the decisions, creates an exemption to the equalizing operation of the statute.

"But there are other elements in this case which were absent in *Gourlay v. Hodge*, and which, after full consideration, appear to me broadly to distinguish the two cases, and to lead to a different judgment as to the application of the equalizing statute. If one thing is more clearly proved than another, it is that the granting of this bill and the subsequent purchases and settlement were

transactions in the ordinary course of business between the petitioners and the bankrupts; they were precisely such transactions as had been going on between them for years before. It is also a fact in the case that the dealings in question were dealings in the course of a running account between the parties.

"The exemption from the statute of transactions in the ordinary course of trade has most commonly been considered by the Court in the case of payments by a bankrupt by means of drafts or indorsation. But it applies still more clearly to sales in market for a fair price (Bell's Com. II. 219, M'Laren's ed. 206). Mr. Bell remarks that 'the cases have not yet been sufficiently numerous to settle all the questions that may be raised on the subject.' And this remark still remains true, probably because the exemption of sales in the usual course of business is so obvious that parties have seldom raised any questions about them that could come before the courts of law. There is no case quite the same as this, but it appears to be within 'the only general doctrine' which Mr. Bell hazards in the passage referred to, viz., 'that wherever the transaction is in the ordinary course of dealing, and requisite or suitable to the fair purpose of the debtor proceeding with his trade, and unaccompanied by indications of collusion or notice of insolvency, it is not challengeable, though the effect may be to give a preference to one creditor over the rest.' The Lord President, in *Gourlay v. Hodge*, makes it one of the grounds of his judgment that the purchases of grain by Hodge were greatly in excess of the requirements, and entirely contrary to the custom, of his business; and indeed I can hardly avoid thinking that the preference granted there would have been reducible for legal fraud, altogether apart from the Act 1696. Here there is perfectly fair and open dealing, precisely in the same manner and to the like extent as the parties had dealt for years; and there is no suggestion that the petitioners were buying more sugar than they needed for the purposes of their business. They bought it, too, not merely in the market and in the ordinary course of their business, but by auction; and a sale by auction is *a fortiori* of an ordinary sale, as was said in the case of *Bruce v. Hamilton* (Jan. 27, 1832, 10 S. 250). There a creditor of Mr. Rennie of Phantassie bought two horses at a sale of Rennie's stock, within sixty days of his bankruptcy. He did not give a bill for them, as was required by the rules of the roup, and afterwards, having retained the price in compensation of his prior debt, the sale was held not to be reducible. The Lord Justice-Clerk said, 'This was a transaction in the ordinary way this bankrupt carried on business, and is just one of the cases excepted from the statute, which does not cut down any incidental preference arising from such transaction.'

"For this reason, and for that to which I shall immediately advert, I think that the sales in question are unchallengeable. But the respondent maintains that, even if they be so, the settlement of 24th March was bad under the Act, because it brought into account a bill not due till a month afterwards, and applied it to an obligation of which the Port Dundas Company was entitled to require immediate implement. There are various answers to this argument. But apart from the fact that such a settlement was merely what the parties had been doing every month or so for several years, and was thus itself in the ordinary course of business, it is enough to say it is not by any means clear that the settlement is a necessary part of the petitioners' case. Even had it never been made, I think that the sales and transfers following on them would have availed the petitioners to enable them to claim delivery of the goods they bought without paying the price of them a second time. They seem to be entitled, in the circumstances, to found on the payments or advances to the bankrupts, even apart from any formal adjustment of accounts.

"This will appear still more plainly in considering the other ground on which, I think, the petitioners are entitled to succeed in this question, viz., that the whole transactions are parts of a 'mutual debit and credit under a running account, which must be taken altogether as one transaction, the articles, *hinc inde*, being counterparts not to be disjoined.' This is the ground on which, according to Mr. Bell, Lord President Campbell placed the decision

in *Richmond & Freebourn's Trustees v. The Pelican Insurance Company* (1805, M. Bankrupt App. 25; 2 Bell's Com. 218, note; M'Laren's ed., p. 204). See also *Dundas v. Smith* (1808, M. Bankrupt App. 28); and *Stein's Trustees v. Sir W. Forbes & Co.* (1791, M. 1142, also referred to in Bell's Com. l.c.). It is true that the items in the accounts in these cases were cash payments or bills, while here the items on one side are chiefly invoices for goods sold; but I cannot discover any reasonable distinction between a *bona fide* current account, such as was kept by the parties here, and the accounts in those cases. The principle seems to be, that when parties have been conducting their business and settling their transactions in good faith by means of a running account, it would be injustice to set aside the transactions on the one side, while all the engagements on the other side undertaken on the faith of these transactions are held effectual. And even if it should be thought doubtful whether this principle can be admitted where the preference really arises within the sixty days, or when, for example, the payments to the bankrupt fall short of the payments or obligations entered to his credit, there is here the same specialty on which the case of *Stein's Trustees v. Forbes* (cit.) was decided, viz., that the payments to the bankrupt within the sixty days not only equalled, but exceeded the value of the sales within the same period. For it will be found that while the petitioners purchases within that period were, roughly, £8300, his payments amounted to £9100; so that if restored to their position at the beginning of the sixty days, the petitioners would in fact profit to a considerable extent.

W. G."

The Sheriff-Substitute granted leave to appeal, and the Sheriff after hearing parties adhered.

Act.—*Wilson & Caldwell.*—*Alt.*—*M' Lay, Murray, & Speirs.*

Notes of English, American, and Colonial Cases.

NEGLIGENCE.—*Landlord and tenant—Liability for injury to a stranger from premises being out of repair.*—Plaintiff, a stranger to defendants, was injured by a chimney-pot accidentally falling upon him from a house in the occupation of a tenant to defendants. Defendants were under no contract with their tenant to repair, and the premises were not out of repair at the time they let them:—*Held*, that defendants were not liable to plaintiff for the injury he had sustained, *Nelson v. The Liverpool Brewery Co.*, 46 L. J. Rep. C. P. 675:—*Held* also, that this would not be altered by a custom amongst landlords to do external repairs in the absence of any express provision in the agreement for letting, since such custom would not create an obligation to repair, for the neglect of which they could have been sued by their tenant.—*Ibid.*

PATENT.—*Infringement of patent rights—Contract with the Crown—Purchase, or agency.*—The appellant was the assignee of several letters patent for the improvement of breech-loading fire-arms; and the respondents were a joint stock company who entered into a contract with the Secretary of State for War for the manufacture and delivery of certain rifles for the public service. By the terms of the contract the tubes and stocks of the rifles were to be manufactured by the respondents out of materials supplied by the Government. In manufacturing the rifles the respondents made use of the processes which were the subject of the letters patent. In an action for infringement of the letters patent,—*Held* (reversing the judgment of the Court of Appeal), that the contract did not make the respondents servants or agents of the Crown within the decision in the case of *Feather v. The Queen* (35 L. J. Rep. Q. B. 200), so as to absolve them from the infringement, and that they were consequently liable in the action.—*Dixon v. The London Small Arms Co.* (H.L.), 46 L. J. Rep. Q. B. 617. Remarks on the case of *Feather v. The Queen.*—*Ibid.*

SOLICITOR AND CLIENT.—*Property in letters.*—Letters received by a solicitor from his client, and copies of letters addressed by a solicitor to his client, are the property of the solicitor.—*In re Wheatcroft*, 46 L. J. Rep. Ch. 669.

STOPPAGE IN TRANSITU.—*Bill of lading—Transferee for value—Past consideration.*—The vendee of goods may, by assignment of the bills of lading to a bona fide transferee, defeat the vendor's right to stop them *in transitu* in case of the vendee's insolvency, although the consideration for which the assignment is made is a past one, and has not been got by means of the bills of lading.—*Rodger v. The Comptoir d'Escompte de Paris*, 38 L. J. Rep. P. C. 30, —dissented from.—*Leask v. Scott Brothers* (App.), 46 L. J. Rep. Q. B. 576.

VENDOR AND PURCHASER.—*Contract by letters—Acceptance of offer, subject to a formal agreement being signed—Statute of frauds—"Proprietors," whether sufficient description.*—An estate was bought by eight persons, of whom R. and C. were two, as a joint speculation, and conveyed to R. and C. in trust for the eight. In 1871 and 1873 the eight owners offered parts of the estate for sale, subject to conditions which only described the vendors as the proprietors in possession. Subsequently M. made a verbal offer to the agent of the eight owners to buy three lots remaining unsold. The agent told M. he must buy subject to the conditions of 1871, and promised to lay his offer before the proprietors. The agent then wrote to M., saying the proprietors had accepted his offer, subject to the conditions, and after stating the terms of it, said he had instructed the solicitors to forward the agreement for purchase. M. then wrote and accepted this offer, subject to one stipulation, which was agreed to. A formal agreement was prepared by the solicitors, and sent to M., but M. refused to sign it, or to complete the contract. An action was brought by R. and C. for specific performance, to which a demurrer was allowed for want of parties, and the statement was then amended by making the eight owners co-plaintiffs :—*Held* (approving the decision of the MASTER OF THE ROLLS), that the word "proprietors" was a sufficient description of the eight owners; but (reversing his decision) that as the letter provided for sending a formal agreement, the signing that agreement was a condition precedent to a complete and binding agreement being made between the parties within the Statute of Frauds.—*Rossiter v. Miller* (App.), 46 L. J. Rep. Ch. 737.

PATENT.—*For a combination—Insufficient specification.*—Where a patent is taken out for an invention consisting of the combination in one thing of several subordinate parts, the question whether or not a person taking and using a certain number of such parts and omitting others has taken the substance of the invention, and thereby infringed the patent, is a question not of law but of fact, to be decided by the jury or Court with reference to the circumstances of the particular case.—*Clarke v. Adie* (H. L.), 46 L. J. Rep. Ch. 585. Where a patent is taken out for a combination, it will protect the several subordinate parts and all subordinate combinations of such parts, provided the subordinate parts or combinations be themselves properly subjects for a patent, and also provided that it is clearly and precisely defined by the specification what are the subordinate parts or combinations of parts in respect of which, as well as the entire combination, protection is claimed. (*Ibid.*) A patent was taken out for "improvements" in a machine for clipping horses and other animals; one of the improvements relied upon was the combination in the machine of four things, viz.—(1) the arching of the cutter plate so as to give elasticity; (2) the use of fixed stems instead of screws to connect the cutter plate and comb plate; (3) the adjustment of certain nuts and washers so as to prevent friction; and (4) the mode of communicating motion to the cutter plate so as to bring it into the true time of cutting. The first item was not described or referred to in the specification, but was merely shown by certain drawings attached to the specification; each of the three other items was admitted to have been well known and used in the trade; the specification did not contain any distinct claim in respect of the combination :—*Held*, that the specification was not sufficient, and that the combination of the four items was not protected by the patent.—*Ibid.*

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STAIR AND ARGYLE

A FORGOTTEN PASSAGE IN THE LIFE OF LORD STAIR.

*By Æ. J. G. Mackay, Esq., Advocate, Professor of History in the
University of Edinburgh.*

IN looking over the books of an old library of the family of Graham of Fintry in Forfarshire, I fell upon a volume chiefly consisting of Theses of Students for the degree of Master of Arts in the 17th century. They included Theses delivered at all the Scottish Universities, St. Andrews and Aberdeen, Glasgow and Edinburgh, and at some of the foreign Universities to which the wandering Scottish scholar, even after his own country had provided him with seats of learning, still resorted, Leyden and Utrecht, Basle and Deventer. Amongst them, one in particular attracted me, which had this title-page: Theses Logicæ, Metaphysicæ, Physicæ, Mathematicæ et Ethicæ. Quas Adolescentes hac vice in Collegio Glasguensi cum Laurea emittendi cum the publicè propugnabunt ad diem Julii, Anno Domini 1646. In communi Gynnasii Auditorio horâ solitâ. Præsides Jacobo Darimphio. Glasguæ, Excudebat Georgius Andersonus, Anno Domini 1646.

On further examination this small tract of thirty pages disclosed some hitherto unknown or forgotten facts in the life of James Dalrymple, at its date a Regent or Professor in the College of Glasgow, who afterwards became Viscount Stair, and President of the Court of Session. These seem worthy of being rescued from the dusty volume in which they have been hidden for two centuries, as they relate to the greatest lawyer the legal profession in Scotland has produced.

The information they contain belongs to his student years, before he had entered into a profession which frequently, and in an increasing degree in recent times, makes men afraid of being thought students, and anxious to acquire a reputation for practical sagacity

at the risk of the imputation of ignorance in every department of knowledge except law. But the ambition of Stair was of another kind. His character as a lawyer was due to no prudent renunciation of this sort, but to his retaining to the end of life the love of learning and science which had distinguished his early manhood. It was known previously that Stair was a Regent in the College of Glasgow from 1st March 1641 to October 1647, having exchanged in the former year the military profession, in which he had served during the Civil War as Captain in the Earl of Glencairn's regiment, for the academical—to use his own phrase, as Forbes says in his brief notice of him in the Preface to the Journal of the Session, “*A Martis ad Musarum castra traductus fuit.*” This phrase it now appears was taken from Stair's dedication of the present thesis to Archibald Lord Lorne, eldest son of the great Marquis of Argyle, the most illustrious by birth of the martyrs of the Covenant. The dedication further informs us that the cause of Stair's leaving the army was his appointment by the Marquis as tutor to Lord Lorne. “*Ego etiam,*” he says in it, “*qui non ita pridem eâdem de causâ belli ærumnas sustinui et rebus aliquamdiu sopitis a martis ad musarum castra traductus fui tibi que Illustrissimorum parentum tuorum erga te cura atque insigni erga me et meritâ benevolentia institutor præpositus sed infelicibus iis commotionibus divulsus.*” The passage which follows is not free from ambiguity, but I take it to mean that Stair, after his first appointment as tutor to Lord Lorne, was compelled by the exigencies of the times to resume his military service. If so, we must place the appointment between 26th July 1637, when Stair graduated in Arts at Glasgow, and the spring of 1641, when he returned on his election as regent, for after that date we know that he continued to reside at the University till his resignation in 1647. I incline to place it in the earliest of these years, 1637, and to suppose that his return to the army was during the campaign of 1638-9, and that he may have been present at Dunse Law. The expression, at least, which I shall now quote, seems more applicable to this than to any other period of the Civil War: “*Qua propter mollitiem scholasticam indignatus cum arca et Israel sub dio erant ad eandem à qua veneram vitam militarem redii atque otium securitatem et quæcumque mihi chara fuere publicæ utilitate litavi meosque labores quantuloscumque sinceri cordis affectu devovi.*”

The Marquis of Argyle had then come to the camp of Lesly, as we know from Baillie's graphic description of the scene on Dunse Hill: “Our brave and rich hill; . . . for I, quoth the wren, was there among the rest, being chosen preacher by the gentlemen of our shyre (Ayrshire), who came late with my Lord Eglinton.” For he mentions in the same letter to Spang of 26th September, which contains this description: “Argyle was sent for to the treatie of peace, for without him none would mint to treat; he came and sett up his tent in the hill, but few of his people with him.”

Nothing seems more probable, therefore, than that Stair, although

Glencairn's regiment, to which he originally belonged, was not present, had joined some of the other Ayrshire corps, Lowdoun's or Montgomerie's, Eglinton's or Lauder's, and that either after the Pacification of Berwick, which gave for a time hopes of peace, or in the following year, Stair was again allowed to resume his natural bent for a civil life, from which the scholar and lawyer, though ready when any real need of his country calls, is not diverted by false alarms or for a doubtful cause. Whatever may have been the exact date, his return to the University was, as we now learn for the first time from this Dedication, due to the influence of the Argyle family. "*Verum tamen,*" he says, "*apud te valuit mei desiderium et memoria ut in Angliâ revocatum publicaeque auctoritatis mandato reducem obtinuisti ut te in hac academia attenderem et (quod singulare erat) sine officio quo tum fungebar jactura aut dispendio.*" The office which Stair was allowed to retain seems to have been his command in the army, and this explains the lines of the contemporary satirist:

"How Captaine Staires in syllogistic field
Made Dominie Ronald to his vallour yield,
At that first triumph Glasgow College saw
The juggler turn his sword to ferula."

The remainder of the Dedication gives us no further information as to Stair's life, being occupied, as is usual in such compositions, with compliments to Lord Lorne and his father, whose example he exhorts him to imitate—"Perge ergo quod residuum est generosissime Domine juventutis floribus provectionis ætatis respondeant fructus et efflorescentiæ felicitas. Habes ob oculos familiare exemplar notissimum tibi et cognatissimum illustrissimi Marchionis Parentis tui nobilissimi vitam per omnem statum prosperum et adversum turbidum et quietum velut unicam tibi præponendam et imitandam ideam."

We learn from the records of the University that Lord Lorne was one of the members of the fourth class in Arts in March 1643, and he would therefore have reached the time for graduation in July 1646, when this declaration was written. His name is not, however, included in the list of disputants appended to it, so it would appear that he did not proceed to his degree, having perhaps before this time left Glasgow, though it is possible he still remained there, as he mentions in his speech before the Court of Justiciary in 1681, "As soon as I passed the schools and colleges I went to travel to France and Italy, and was abroad 1647, 1648, and till the end of 1649."¹

Amongst those who did graduate it is interesting to notice the name Robertus Laus—the student whose notes of Stair's lectures are still preserved in the Advocates' Library. The Theses, written as the custom was by Stair as regent, and which the students he had educated were to defend, are on the customary topics,—Logic,

¹ State Trials, viii. 910.

Metaphysics, Physics, Mathematics, and Ethics. A certain clearness and precision of expression distinguishes them from the many similar productions which were every year poured forth from the Universities of Scotland and of Europe, but they are steeped in a dry scholastic mannerism that deprives them of much interest in our time, which has so entirely changed its mode of thinking, and believes, probably with justice, that such a style of composition strangles original thought.

Of much more interest than the Thesis itself is the fact, now first established, of the early connection between Stair and the Argyle family, which was to continue throughout the vicissitudes of the eventful period in which the lives of the tutor and his pupil were cast.

The Marquis of Argyle was the representative leader amongst the Scottish laity of the moderate party of the Covenanters—who, if the Stuarts would only have accepted the Covenant, and stood by the Presbyterian Established Church, were prepared to support the monarchy against all its enemies. But this was an impossible condition, and after placing the crown on the head of Charles II. in 1650, and yielding only a reluctant and compulsory obedience to the government of Cromwell, Argyle was the first victim of the Restoration. He was beheaded on 27th May 1661. "I had the honour," he said at his execution, "to place the crown on the king's head, and now he hastens me to a better crown than his own."

His son, Stair's pupil, must have been born about, probably before, 1630; the exact date is unknown, but he can scarcely have commenced his studies at Glasgow in 1643 under the age of thirteen, and the date of his marriage in 1650¹ points to the same, or even an earlier date. After completing his education he travelled in France and Italy, and soon after his return to Scotland married Lady Mary Stuart, the eldest daughter of the fifth Earl of Murray. In the same year he received a commission as Colonel in the Foot Guards, in which capacity he served on the Royalist side at Dunbar. After the defeat of Worcester he retired to the Highlands, and maintained so strictly his adherence to the defeated cause that he was exempted from Cromwell's general pardon to the Scotch in 1654. In the following year Middleton induced him to submit to the Protector, but, as he was still suspected of Royalist sympathies, he was imprisoned in Edinburgh Castle by Monk, where he remained till the Restoration. Being then released, he went to London, where he was well received by Charles, and pleaded hard for his father's pardon, but without effect. If we credit Burnet, Charles II. on the occasion showed himself an adept in that duplicity which had marked his father. "Argyle," he says, "writ by his son to the king asking leave to come and wait on him. The king gave an answer that seemed

¹ 13th May 1650. Lamont's Diary, p. 10. Stair himself laureated at the age of eighteen; but there are instances, as in the case of Bishop Burnet, of degrees taken by boys of fourteen.

to encourage it, but did not lead him to anything. I have forgot the words. There was an equivocating in them that did not become a prince. But his son (i.e. Lord Lorne) told me he wrote them very particularly to his father without any advice of his own. Upon that the Marquis of Argyle came up so secretly that he was within Whitehall before his enemies knew anything of his journey. He sent his son to the king to beg admittance, but instead of that he was sent to the Tower."¹

After his father's execution, the Scottish Parliament, then under the influence of Middleton, seized upon an anonymous letter written by Lord Lorne to Lord Duffus as a pretext, and procured from the King an order by which he was forced to return to Edinburgh. As soon as he arrived there he was summoned before Parliament, refused bail, and imprisoned for the second time in Edinburgh Castle. Like Stair, however, he found a friend in Lauderdale, whose wife's niece he had married as his second wife, and when that nobleman was placed at the head of affairs after the fall of Middleton in 1663, although he had been found guilty of leasing-making, or sedition, and sentenced to death, he was released, and his estates and the title of Earl were restored. In 1664 he was allowed to take down his father's head from the Tolbooth, where it had been exposed, since his execution, on the same spike on which the head of Montrose had formerly stood.

A curious correspondence between Argyle and Lauderdale has been preserved, from which we learn that he was now again brought into contact with Stair in a different relation from that in which they had first been made acquainted with each other. Stair had become a Lord of Session, and the great debts the Argyle family had incurred during the troubles rendered some arrangement with their creditors necessary. This was effected by the appointment of a Royal Commission to consider the validity of the creditors' claims, which was, in fact, a sort of Bankruptcy Commission, and Stair was nominated one of the commissioners.²

By the terms of this arrangement Argyle received a gift from the Crown of his forfeited estates. Provision was made for the payment of wadsets and his father's debts. His mother's jointure and the younger children's provisions were also to be paid. Argyle was to receive an estate of £15,000 a year, and the remainder of the property was to be divided equally amongst the Marquis's children.³

From the same source we are also informed that Stair was about this time called upon to decide in a dispute between Argyle and the Bishop of the Isles as to the property of the Island of Canna, which, though the account Argyle gives of it to Lauderdale acquits Stair of the charge of partiality as a judge his enemies sometimes brought against him, shows how perilous were the temptations to

¹ Burnet's History of his own Time, p. 106.

² Letters of Earl of Argyle to Lauderdale, Bannatyne Club, p. 7.

³ Lochiel's Memoirs, by Mr. John Drummond, pp. 167, 170 195.

which he was exposed. "The Bishop of the Isles," he writes, "pretends a right of property to the Isle of Canna, and did endeavour to put himself in possession two years ago. I did not at first understand the business, and I was so tender of it that first I called my advocates and made them debate it with him before me. After that I took the Bishop before my Lord Staires as a friend to both; *he would give no opinion because he was to judge it, but I was glad he should hear us*, for the bishop complains a little severely, and threatens to inform his Majesty that he is oppressed because I alleadge I possesse."¹

During the greater part of the reign of Charles II., Argyle, like Stair, maintained his allegiance to the Crown, and in his speech in the Court of Justiciary, on his trial in 1681, he claims credit for having been prepared to assist in the suppression of the insurrection in 1666, and for having sent a messenger to General Dalzell just before the battle of Pentland Hill, informing him that he had raised about 2000 men to support the royal cause. But when the Duke of York came to Scotland, and the Test Act was passed in 1681, the moderate Presbyterians felt the time was at last come when they could no longer reconcile loyalty to the Crown with loyalty to their country and their faith. Stair was deprived of his office of President of the Court, and Argyle, having declared that he took the test only so far as consistent with itself and the Protestant religion, was tried under the Acts of Parliament against leasing-makers and slanderers of the King for the crimes of perjury and treason. The charge of perjury was too absurd even for a jury of which his hereditary enemy Montrose was Chancellor, and his chief opponents were members, but by a constructive interpretation, similar to that a century later applied to the English Treason Statutes by the Crown lawyers of George III., he was found guilty of treason and condemned to death. It is interesting to notice similar constitutional principles expounded by Lockhart, and the other lawyers who defended him, to those which were still more clearly enforced with better success by the eminent Scotchman who became the most brilliant ornament of the English bar. Since Erskine's great victory, the greatest ever won by a British lawyer in a law court, constructive crimes have been banished from the courts of our country in which justice is administered, though they are still sometimes to be met with in the proceedings of ecclesiastical tribunals which have not learnt to distinguish justice from policy.

Amongst Argyle's advocates was Stair's eldest son, Sir John Dalrymple, whose reputation as a lawyer was first made by his pleading in this trial. Argyle escaped from prison in the dress of a page of his step-daughter, Lady Sophia Lindsay, and, after lurking some months in London, went over to Holland in 1682. Here Stair soon followed him, and in the anxious years of exile which intervened, until Argyle returned on the ill-fated expedition in 1685,

¹ Lochiel's Memoirs, by Mr. John Drummond, p. 19.

during which James II. was completing, by his tyrannical and persecuting government, the ruin of the Stuart race, there can be little doubt that the tutor and his pupil were once brought into close personal contact. In the criminal trials to which the expedition of Argyle gave rise, notwithstanding the infamous means used to extort evidence by torture from Carstaires and Spence Argyle's servant, no sufficient proof was obtained of Stair's complicity in the expedition. Carstaires, after torture, only deposed that "he found Stair shy," and that the Earl of Argyle told him that "he thought Stair might be gained to them;" and Spence's deposition, which named Stair, wrung from him after he had been twice tortured with the thumb-knives, to avoid the more excruciating agony of the boot, cannot be deemed worthy of credence. It appears not improbable that his greater prudence made him hold aloof from an attempt which the event proved to be premature. Argyle was taken prisoner after his scanty band of followers had been dispersed at Kilpatrick by Lord Dumbarton, and on 20th June 1685 he was executed without further trial on the old sentence pronounced against him in 1681. His epitaph, written by himself, is one of those pieces which has been preserved on other grounds than their poetic merit:—

"Know, passenger, that shall have so much time
To view my grave, and ask what was my crime,
No stain of honour, no black vice's brand,
No secret guilt e'en made me fly the land.
Love to my country, Truth condemned to die,
Forced my old hands forgotten arms to try.
On my design though Providence has frowned,
Yet God at last will surely raise His own.
Another hand, with more successful speed,
Shall raise the remnant, bruise the serpent's head."

In little more than three years the prophecy with which it concludes was accomplished. Stair, more fortunate than his old pupil and friend, returned to Britain with William of Orange, whose "successful speed" delivered our country from the degenerate descendants of the once noble race of Stuart, and restored the principles of the Constitution for which Argyle died and Stair suffered exile.

IMPLIED ENTRY.

It has always been a principle of decision by the Judges, and of legislation by Parliament, that, in questions affecting the title to landed estate, great importance will be attached to what may be called "conveyancing use and wont," the general practice and understanding on which titles have for some time been made up. Even when this involves a sacrifice of the precise symmetry of legal definition, the advantages are none the less obvious of following an established custom which is not in itself mischievous or inadequate

to the purposes of a system of titles to land. And where legal principle and professional practice both pointed to the same result, it is not conceivable that, upon an irresponsible view of the public advantage, any court of law would venture to lay down a new rule in such matters inconsistent, it might be, with valuable vested pecuniary rights. What, however, could not be done in the administration of the common law, the Court of Session have certainly succeeded in doing by way of interpretation of a statute, and in defiance, as we think, of the plain declarations of the statute. We refer to the cases of *Ferrier's Trustees v. Bayley* (May 26, 1876, 14 Sc. L. R. p. 480), and *Rossmore's Trustees v. Brownlie* (Nov. 23, 1877, 15 Sc. L. R. p. 129), in which the Second and the First Divisions have successively decided that, since the passing of the Conveyancing Act, 1874, it is not competent for a purchaser who is infest, and not possessing on a personal title, to tender the heir of the last-entered vassal for an entry on payment of relief duty in answer to the superior's demand for a composition.

In the first of these cases the *dominium utile* had been conveyed by A. in 1832 by a disposition containing an obligation to infest, *a me vel de me*, a procuratory of resignation, and a precept of sasine. On this B. took infestment, and on A.'s death in 1868 A.'s heir was entered as vassal in the mid-superiority by precept of *clare constat* from the superior. On B.'s death in 1873 the trustees of his settlement made up a title to the *dominium utile* by notarial instrument, and conveyed to C., who was infest in 1874, prior to the passing of the Conveyancing Act, 1874. In 1876 A.'s heir also died, the fee became vacant, and it appeared that C., although a singular successor, deriving title through the sale of 1832, was also heir of the heir of A. On being asked for a composition, C. therefore replied that he was entitled to tender himself for entry as an heir, either by precept of *clare constat*, or on special service, and that he was liable only in relief duty. We do not notice the argument that there being a contract or quasi-contract between the true owner and the mid-superior, the estate of the latter was not defeasible at the will of the former at the date of his infestment. It was held by Lord Justice-Clerk Moncreiff and Lord Ormidale (dissenting Lord Gifford), affirming the judgment of Lord Curriehill, that by the operation of the Conveyancing Act, 1874, C. was not so entitled to tender himself as heir. It was distinctly admitted, and, indeed, could not be disputed without re-considering the well-considered case of *Hyslop v. Shaw* (May 13, 1863, 1 Macph. 535), that under the old law, before 1874, the disponee was perfectly entitled to bring forward the heir, or one heir after another, and that the superior was bound to enter the heir if the heir consented to enter. There thus existed a contingent right of perpetual escape from the payment of composition, and it makes no difference in a question with the superior that this right could not be separately exercised by the disponee, but required the concurrence of the heir.

Superiors were naturally irritated, and frequently called this form of title an evasion of their legal right. In *Ferrier's Trustees* Lord Ormisdale called it "a technical manœuvre or device." But, with the single exception of Mr. Duff, no Scotch conveyancer of any eminence has ever doubted that the superior's obligation was one well ascertained and defined by law. It was, indeed, the only doctrine consistent with feudal principle, and it was supported by a large amount of conveyancing practice. What is more to the present purpose, it was not disputed in *Ferrier's Trustees v. Bayley*,—for the Judges say that the law has been *changed* by the Conveyancing Act, 1874. Their argument is this: that section 4 subsection 2, of that Act gives to every infeftment, whatever its date, the effect of a confirmation of the infeftment according to the existing law and practice. The effects of confirmation were chiefly these: (1) confirmation of base infeftment; (2) evacuation of mid-superiority; (3) liberation from the obligations in the feu-charter of those liable under the old investiture; (4) discharge absolutely of casualties to date of charter and of arrears of feu-duties. As Lord Curriehill admits, however, the Act, section 4, sub-sections 2 and 3, expressly declares that the 3rd and 4th effects will not follow from a statutory implied entry, for it provides that liability under the original investiture shall continue until intimation under the statute, and it excludes the discharge which was formerly implied by confirmation. But it was said by the majority of the Judges that, as the fee is filled by the implied entry, it is necessarily impossible to tender the heir for an entry to the mid-superiority which has been destroyed. In the language of Lord Curriehill: "One of the main objects of this statute was not only to facilitate conveyancing, but to abolish the creation of mere technical base fees and mid-superiorities, which, by a rigid adherence to old feudal forms, had complicated and encumbered progresses of title, without conferring any real benefit on any of the parties concerned." The statute, however, contains no prohibition of base infeftments, and, although it prohibits generally all writs by progress, it specially excepts precepts of *clare constat* and writs of acknowledgment. Two views may be taken of the effect of this entry by implication. It has either all, or only some, of the effects of confirmation. We have already seen that some are excepted by the statute, and it may be that others are excepted from the nature of the case. Is it, then, prohibited by the statute for every person infeft in lands to make up a title as heir of the last entered vassal? In *Ferrier's Trustees* it was strongly urged by Lord Gifford, who dissented, that even after infeftment, or implied confirmation, there might be a title made up as heir of the seller. This would of course be competent if the disponee were holding on a personal title, for there would then be no implied confirmation, and, perhaps, such a case, along with the case of simple succession without disposition, satisfies the language in which the statute has re-

served the right to grant a precept of *clare Constat* or writ of acknowledgment. But, although that reservation is introduced by way of *proviso* on the general prohibition to grant writs by progress, yet the language in which it is made is very strong and comprehensive: "nothing in this Act contained" is to prevent the granting of precepts of *clare constat*. If words are to receive their natural meaning, this evidently means something wider than "nothing in the foregoing section contained" (a well-known phrase to Parliamentary draughtsmen), and must therefore include the matter of implied confirmation, which the statute immediately in the same section proceeds to deal with. If, however, the reservation is said not to apply to the case of implied confirmation, it might be argued, that if the power to make up a title as heir of the seller is necessary to protect the purchaser from a casualty to which he was not liable, if the heir consented to enter, before the Act, and if, as the Act provides, the implied entry does not entitle a superior to demand a casualty sooner than he could by the law prior to the Act, then by necessary implication power is reserved to make up a title as heir of the seller. Such, indeed, would be the proper criticism of the Lord President's judgment in *Rossmore's Trustees*, for he says that a casualty is due by the mere fact of implied confirmation. The 4th sub-section of section 4, however, clearly shows that the Act contemplates the death of the vassal, and not the implied confirmation as the occasion of liability: for it authorizes a petitory action against the disponee whether infert or not. But whether a double title might in such circumstances be made up or not; and whether or not under the old law a precept of *clare constat* might be granted by a superior who had granted a charter of confirmation; or whether the reasons urged against the possibility of the latter course have any application to a case of title being made *ipso facto* by law: the true view of this question is, we think, that taken by Lord Gifford in *Ferrier's Trustees*, and Lord Deas in *Rossmore's Trustees*. These Judges point out that, whatever simplification of title takes place under the Act, it is anxiously declared that the pecuniary rights and liabilities of superior and vassal shall remain the same: that, as we said before, the implied entry does not hasten a superior's right to a casualty. In defence of the two judgments which the Court has pronounced, it is said that this declaration was intended to apply to the case where the vassal was not dead, and where, therefore, a premature claim for composition might have been made, on the ground that the entry by confirmation necessarily implied this. It would, however, have been difficult to show that, according to the old law, where the disponee had an alternative title which he was interested in completing, he could be held to have agreed to pay composition by applying for a public entry in his character of singular successor. But assuming that the declaration in the statute includes the case of a vassal being still alive, it certainly includes a good deal more; and this, in particular, unless

the contrary appear from other parts of the Act, that the disponee is not to be compelled to pay perhaps many thousands of pounds, because he had taken (it may be, before the Act) the ordinary precaution of infesting himself, and although before the Act he was unquestionably entitled to tender a series of heirs, and so postpone composition it might be for generations. Whether this was a wholesome or desirable state of land-titles is a totally different question, which cannot possibly affect the interpretation of the statute. But the argument against the superior's claim is certainly not met by a suggestion made by the Lord President in *Rossmore's Trustees*, that "if it had been the purpose of this statute to perpetuate that *quasi* right of a purchaser to bring forward an heir, it would have been very easy to do so by a few words in this enactment; by saying that the superior shall not be entitled to a casualty as upon the entry of a singular successor *if there be in existence the heir of the vassal last entered with the superior.*" Nobody maintains that this was the state of the law at any time: the existence of an heir is no answer to a claim for composition, if the heir does not come forward to complete an entry. But, passing from verbal criticism, it would have been contrary to the general plan on which statutes are framed to insert such a declaration. As in this particular case, reservations are generally made in general terms, which, it is here argued, extend to the matter in dispute. Of every doubtful interpretation of a statute it may be said that the difficulty might have been avoided by the use of certain expressions. Besides, where there is a distinctly ascertained legal right in existence, express words are required to destroy it; and as the right to tender the heir is not necessarily connected with the practice of granting writs by progress, there is no room for necessary implication. The whole statute is in favour of vassals. In conclusion, we doubt whether the majority of the Judges in these two cases have sufficiently considered the really valuable and widely exercised right of the disponee which they have now destroyed. As Lord Deas has observed, the right has been allowed for in settling many a sale. They have certainly under-estimated the extent to which the right was enforced in practice; and a legal right is not weakened by calling it a "fiction," a "device," or a "technicality." All property titles are technical.

THE PRISONS (SCOTLAND) ACT, 1877,
40 AND 41 VICT. CAP. 53.

No. II.—PART II.—*continued.*
SUPPLEMENTAL PROVISIONS.

(f) *Jurisdiction.*

In our last number we considered the provisions of the above Act down to the end of the 36th section. The next division of the Act

treats of the Sheriff and other officers: the present jurisdiction of these persons over prisons locally situate in their respective counties or burghs is to continue, and all powers necessary to give effect to the Act are by this section (sec. 37) conferred upon such officers; but the Secretary of State may do away with such jurisdiction, by declaring that a prison is to be considered the prison of a particular county or burgh, though not locally situate within them, in which case, we presume, the jurisdiction would be transferred to the Sheriff and other officers of the said county or burgh. By the next section the jurisdiction and responsibility of magistrates of burghs, with regard to prisoners under sentence of death, is declared to be unaffected.

(g) Discontinuance of Prisons.

The subject which is next discussed in the Act, viz., the discontinuance of prisons, is one which will probably give rise to considerable difference of opinion in various localities. Power is given to the Secretary of State (sec. 39) to order any prison he may think proper to be discontinued. The sole responsibility, however, does not rest upon him alone, as any order of the above nature must, if Parliament be sitting, be immediately laid before it; or if not sitting at the time, the order is issued within a month after the commencement of the next session. When a prison is discontinued, it may be sold by public auction, and the price, after payment to the Exchequer of £120 for each cell it contained, paid over to the Commissioners of Supply and magistrates of the burgh or burghs within the jurisdiction of the *quondam* authority of the discontinued prison. The Commissioners of Supply and magistrates of burghs may, if they please, purchase the prison, and then either re-sell it or do what they like with it: they may do what they please with the price they get for it, provided that, in the first place, such price must be applied toward the extinction of any sums borrowed in pursuance of this Act. If the prison to be discontinued forms part of, "or is immediately contiguous to," any buildings belonging to such Commissioners or magistrates, they have the right to require the Secretary of State to dispose of it to them at the upset price. The conclusion of this section enacts that, if a prison authority has provided sufficient cell accommodation for all its prisoners in any one prison or prisons, "no sum shall be payable under this section by such prison authority in respect of the discontinued prison; and a proportionate deduction shall be made in the sum payable under this section by such prison authority, in the event of any partial accommodation in excess of the necessary accommodation having been provided in such other prisons belonging to that authority." The language of the Act here is not very clear, as there is no sum mentioned in this clause as payable by a prison authority; and as the Exchequer gets from the sale of the prison £120 in respect of each cell, it is difficult to see for what sums the prison authorities are liable.

(h) Status of Officers.

The next part of the Act, consisting of three sections, is devoted to the consideration of the position of the officers of a prison. They are not of any general interest, and may be alluded to very briefly. Section 41 provides that the clerks in the Edinburgh office of the Managers of Perth Prison shall continue in the same position and perform the same duties as heretofore, and, for purposes of superannuation, the years of previous service under the late General Board of Directors of Prisons in Scotland and the said Managers of Perth Prison will be taken into account. As regards the officers attached to prisons (sec. 42), they are to hold their offices by the same tenure as formerly, perform the same or analogous duties, and receive salaries of not less amount than at present. They are liable, however, to be distributed among the prisons as may be directed, and are not, therefore, permanently attached to any one prison in particular. Military and naval pensioners are to enjoy their pensions without deduction in addition to their official pay. We are sorry not to observe in the Act a statement that, in the appointment of the inferior officers of a prison, preference would be given to applicants who had served in Her Majesty's forces. Not only would this have an additional encouragement for respectable and well-educated men to enlist in the army for a certain time, but it would have had the effect of procuring the best class of men that can be appointed as prison officials, men who are accustomed to the care and management of persons put under them. No doubt, however, due weight will be given, in the appointment of such officers, to the fact of their having served in the navy or army. The 43rd section deals with superannuation allowances to prison officers, into which it is not necessary to enter in detail. It may be mentioned, however, that in a later part of the Act there are two sections which have reference to the subject of superannuation. By one (sec. 59) it is enacted that no officer shall by this Act be entitled to superannuation, the conditions of whose office would not have entitled him to such allowance under the Act of 1860. By the other (sec. 60), the clerk, treasurer, or similar officer to a prison authority, may be granted a retiring allowance, the sum so payable being a charge against the county general assessment, or police assessment of a burgh.

(i) Miscellaneous Matters.

A large proportion of the remainder of the Act is classed under the above heading, but some very important sections are to be found in it. The first section in it (sec. 44) contains a somewhat remarkable provision, inasmuch as it gives power to the Secretary of State to make any general or special regulations as to the mode in which sentences of hard labour are to be carried out. In making such regulations regard shall be had, we are told, to the previous

convictions, the industry and the conduct of the prisoners. The state of health in which a prisoner may be is not mentioned, but due account will no doubt be taken of this; in fact the amount of hard labour which a prisoner will have to undergo will depend greatly upon the report made of him by the doctor and governor of the prison, supplemented by the observations of the Prison Commissioners and Visiting Committee. The next section (sec. 45) is one of the most useful and salutary, to our thinking, in the whole Act. It begins with a regular preamble, pointing out that "whereas it is expedient that a clear difference shall be made between the treatment" of untried persons who are presumably innocent and are only detained for safe custody, and convicted persons who are in custody for the purpose of punishment, and that special rules shall be in force in regard to the former class of prisoners, so as to make their confinement as little as possible oppressive, it is enacted that the Secretary of State shall make special rules as to (1) the retention by the prisoner of the papers, documents, etc., in his possession at the time of his arrest, so far as they shall not be required as evidence against him, and are not "reasonably suspected" of having been improperly acquired by him; (2) the securing of private communication between the prisoner, his solicitor and friends, due care being taken that evidence is not tampered with, and that plans of escape are not made; (3) arrangements whereby such persons may provide themselves with better diet than ordinary prison fare, and generally as to any matter which may be conducive to the amelioration of the condition of such prisoners. Such special rules, if carried out in a prudent and wise spirit, will, it is expected, do a great amount of good, as at present the difference between the treatment of convicted and unconvicted persons is small indeed. The greatest practical difficulty which will occur in the carrying out of these rules is, we think, with regard to the communication between solicitor and client; if such communication is to be entirely "unrestricted and private," as mentioned in the Act, it will be difficult to prevent communications of an improper character being made; if, on the other hand, written communications must be seen by the prison authorities, or the presence of a warder be insisted on at personal interviews, it is not easy to see how the object of the special rule can be carried out. Special rules are also to be made with regard to the treatment of prisoners convicted of sedition (sec. 46) and those who have been committed for contempt of Court.

The duties of the medical officer of a prison are next considered (secs. 48, 49). The first of these sections provides that when the doctor considers it necessary to apply any painful test to a prisoner to detect "malingering," or shamming illness, such test shall only be applied by authority of an order from the Visiting Committee or a Commissioner. The medical officer is to visit the prison at least twice a week, and see every prisoner at least once in that time. Prisoners in the punishment cells are to be visited daily, as are also

those that are sick, whether or not they are in the sick cells. The minds as well as the bodies of the prisoners are to a certain extent put under the medical officer's care. If he thinks the mind of any prisoner is injuriously affected by the discipline or treatment, he is to report the fact to the governor, with such directions as he may think proper. He is also to direct the attention of the chaplain to cases in which he thinks that functionary would do good. A medical register is to be kept, in which is to be entered an account of the state of each prisoner, his disease and treatment; also a report every quarter of the general *hygiene* of the prison as regards drainage, ventilation, water, etc. Additional medical assistance may be called in when necessary, and no serious operation is to be undertaken without previous consultation with another medical man.

The governor of a prison is the official whose duties are next dealt with. He is to visit, as far as practicable, the whole of the prison once a day, and see every male prisoner in it. He is to report to the medical officer any prisoner whose bodily or mental state he may judge to require attention, and shall carry the directions of the medical officer with regard to them into effect (sec. 51). He shall deliver a list of the prisoners in the punishment cells to the doctor and chaplain daily; with regard to these latter prisoners it may be mentioned that it is not in the governor's power (sec. 50) to order confinement to the punishment cells for a period exceeding twenty-four hours; the Visiting Committee, however, are empowered to order similar imprisonment for a fortnight. To this body, too, must be reported by the governor (sec. 52) any case of insanity or apparent insanity occurring amongst the prisoners. When a prisoner dies, the governor has to give three official notices,—one to the Procurator-Fiscal of the district, another to one of the Visiting Committee, and a third, where practicable, to the nearest relative of the deceased. By section 53 is introduced a species of inquest, which is a new mode of procedure in Scotland. By that section it is declared that the Procurator-Fiscal shall hold a "public inquiry" before the Sheriff or Sheriff-Substitute on the body of every prisoner dying within the prison, and, when practicable, sufficient time is to elapse between the death and the inquiry to allow the attendance of the next of kin to the deceased.

Section 54 deals with inspectors of prisons; the present inspectors are to continue in office, and their position is practically unchanged. Power is given (secs. 55 & 56) to the Commissioners of Supply of a county and magistrates of a burgh to borrow money, and to the Public Works Loan Commissioners to make them the necessary advances. The legal estate in every prison is to be vested in the Prison Commissioners (sec. 57), and not in the Secretary of State. Section 58 treats of the rules to be made by the Secretary of State; they may be proved under the Documentary Evidence Act, 1868; they must be laid before Parliament, and have

its approval, otherwise they will be of no effect; and they are not to come into operation until they have been laid before Parliament for forty days.

(j) *District Boards of Lunacy.*

Although the above subject is not thought worthy of a special heading in the Act itself, it is nevertheless so important, that we shall here except it from the herd of "miscellaneous provisions" with which it is classed in the Act. Section 50 of the Act 20 & 21 Vict. cap. 71, which provides for the constitution of the present District Boards of Lunacy, is (sec. 61) repealed; the District Boards are, however, to continue to bear the same name, the only real change being that, instead of the members of such Boards being appointed by the Prison Authority, they are now to be nominated by the General Board of Lunacy. The 62nd section makes provision for the expense of a District Lunacy Board where there is no District Asylum, into which it is not necessary to go in detail. The 63rd section provides for the collection of those assessments which have been formerly collected along with the prison assessment. The following section (64) incorporates the Lands Clauses Consolidation (Scotland) Act, 1845, with the present one, for the purpose of enabling the Prison Commissioners to acquire lands, etc. Clerks of Court and similar officials are to make a return of all warrants of imprisonment and sentences which are pronounced in their courts (sec. 65). The Prison Commissioners are to discharge the duties of the department of Judicial Statistics (sec. 66). A superintendent of that department is to be appointed, who may fill any other office under the Prison Commissioners.

Section 67 authorizes Commissioners of Supply and magistrates of burghs to contribute to Reformatories and Industrial Schools out of the county or burgh funds, but always subject to the approval of the Secretary of State. Then follows a power of submission to Prison Authorities and the Government; and the remaining clauses (69-71) consist of definitions of the various terms used in the Act, which, in a sketch like this, need not be particularized. It may be mentioned, in passing, that the law relating to the aliment of civil prisoners continues unchanged: there are the usual sapient definitions, of a kind that are common to most Acts of Parliament, e.g., "criminal prisoners" are prisoners who are not civil prisoners, and the like lucid explanations. The last section deals with the Acts repealed in this Act, which are given in a schedule appended. This schedule does not, it may be remarked, contain a complete list of the repealed sections of Acts; 20 & 21 Vict. cap. 71, sec. 50, dealing with District Boards of Lunacy, is not mentioned, though it is distinctly repealed in the 61st section of this Act.

We had intended making a few observations on the scope and general tendency of the Act, but our limits compel us to defer this to another occasion. Meanwhile we may say that we cannot con-

gratulate the draughtsman of the Act upon his work: no doubt it was a difficult and complicated task, but some parts of it, such as the latter portion of sec. 40, are quite unintelligible, and many very cumbrously expressed. It is a great pity, but there seems no doubt as to the fact, that it is altogether impossible to write an Act of Parliament in idiomatic English.

ON CERTAIN PRINCIPLES AFFECTING THE LIABILITIES OF MASTERS AND SERVANTS.

NO. II.

YET one more authority we have in the reports where this question was raised and discussed, and that is the case of *Stewart v. The Coltness Iron Company and Dewar* (June 23, 1877, 4 Rettie 952). Stewart was crushed and injured seriously by the roof of the pit where he was working giving way and falling upon him, and he claimed damages in consequence of the failure of the Company, or of Dewar their manager, properly to support the roof with props. The evidence was very conflicting, and related to the supply of prop-wood in the pit, and to complaints said to have been made on this score to those in charge. The pursuer did not, the Court held, make out his allegations of fault, and accordingly the defenders were assoilzied. It is, however, from some observations made by the Judges in delivering their opinions that the interest of this case arises. Thus Lord Ormidale, after noticing the position of the law upon the subject, points out that no incompetency on the part of the managers had been proved, nor any other fault on the part of the Company; nor, further, any personal fault in Dewar. It was indeed a feature in the case to introduce Dewar, the manager, as a defender along with the proprietors. Lord Ormidale goes on to say, "A special point was attempted to be made by the pursuer to the effect that the Company had failed to supply prop-wood, or to have it ready at suitable places in the pit, and that on this ground they are responsible to the pursuer. This might have been a ground of liability if satisfactorily averred and proved. But I am clearly of opinion that no such case has been established. . . . The Company having supplied plenty of wood, no case can be maintained against them on that point. And if the wood being supplied was not carried to and laid down in suitable places in the pit, that must have been the fault, not of the Company, but of others employed in the pit. But the pursuer has not shown that Dewar, the only defender beside the Company, was in fault in that respect." Again, Lord Gifford observed that the only plausible or relevant feature of the case was the charge against Dewar of failing to provide prop-wood at proper places throughout the workings, and that charge had not been substantiated or brought home to Dewar himself. The Lord Justice-Clerk, while not differing, made

some observations on the present state of the law, putting somewhat forcibly the results of the decisions. "There was," his Lordship says, "no obligation whatever to supply these miners with prop-wood on the part of the only persons with whom the pursuer contracted, so that as the law now stands the miner is bound to work, and the master is not bound to supply him with the necessary materials to enable him to work in safety, but only to appoint persons fairly competent to do so. But then it is said this duty is placed on others with whom the miner has no contract, and his remedy lies against them. The present case is not a bad example of the security thereby afforded—if the defenders' argument be sound. The manager throws it on the oversman, the oversman on the fireman, the fireman on the drawer, until, however gross or glaring the neglect, it is impossible to fix liability on any one. It comes to this, according to the defenders, that no one contracted with the miner to give him prop-wood; that there were persons who had undertaken to do this by a separate contract with another, but that who these persons are it is impossible to say." In conclusion, Lord Moncreiff thought that had there been a failure to supply prop-wood the case against Dewar would *prima facie* have been a good one, for his duty was not himself to supply prop-wood, but to see that it was supplied to the miners.

From a consideration of these prior authorities we come, finally, to deal with the unreported case of *Wyper v. The Stevenston Iron and Coal Company*, mentioned at the commencement of this article. As in almost all questions of the kind the facts were very simple. Wyper was a collier employed by the Company at one of their pits near Holytown. In August 1876, when pushing a hutch on the cage at the bottom of the pit-shaft, his arm was broken by a stone which, descending the shaft, fell upon him. The injured man raised an action of damages against the coal-masters, and alleged that they had failed in their duty in not having the cage covered or in some way protected, and also in not having the sides of the shaft properly lined with wood, so as to prevent accidents from falling stones. In his pleas the pursuer distinctly put forward the fault and culpable negligence of the Company, or those for whom they were liable, but made no averment of incompetency against the manager or officials. In the Sheriff Court there was a difference of opinion between the Sheriff-Substitute and the Sheriff: the former held upon the evidence (1) that the shaft was in a safe condition, (2) that the cage did not require to be covered, and (3) it was pointed out that no allegation of incompetency was made against the manager. The Sheriff-Substitute also observed that had the condition of the shaft been bad, not from construction but from neglect, the doctrine of *collaborateur* in the case of the manager was applicable. The Sheriff, on the other hand, thought the shaft not safe, and considered "that the obligation at common law, and also by statute, laid on the defenders, is to board or line

the shaft in such a way as to be safe and secure against accident to those employed therein." The Sheriff also started a new question, not anywhere raised in the pleadings, as to the necessity of the manager being certificated; and, finally, gave the pursuer £40 damages. On appeal, however, this judgment was upset, as indeed upon the authorities it could scarcely fail to be. In delivering judgment Lord Ormisdale said: "A good many considerations have been introduced into the case, and a good many questions raised which to me appear to be rather beside the real point, that point being, as I think, a very simple one. Plainly, and shortly put, the issue comes to be whether the shaft of this pit was properly lined, or whether as to this matter there had been neglect on the part of the proprietors. In the first place I do not think there is sufficient evidence,—indeed, there is scarcely any evidence at all,—to the effect that the proper precautions were neglected in this pit-shaft. The skilled engineer who examined it some time after the accident says he considered the shaft was barred or lined wherever this was necessary, and I may observe that we have proof that the shaft was in the same condition when Mr. Robertson saw it as it was at the time of the accident. Again, it is in evidence that Kyle (the manager) was a perfectly competent man, and that, on the very same day upon which Wyper was injured, he had examined the shaft carefully and found it all in good order. The case then comes to be narrowed to this, that under the clause of the Coal Mines Regulations Act referred to (section 51) the shaft should have been entirely lined. But what I desiderate is evidence to show that from the nature of the ground the shaft was of such a character as to require that complete lining directed in the particular clause of the statute." Lord Gifford, who followed, expressed the same views, observing that if the imperfect state of the shaft were due to any fault of the fellow-servants of Wyper, of course the defenders were not liable; they have employed competent managers. His Lordship also said that he was anxious to point out that a question such as that introduced by the Sheriff as to the manager's certificate was not one which should be raised where neither party had taken it up. The point as to want of proper machinery and appliances was based upon the state of the shaft, but the learned Judge called attention to the fact that the statute only ordained complete lining of the shaft where the strata were unsafe, and of this no proof had been forthcoming. The Lord Justice-Clerk concluded his opinion as follows: "But for decisions, to which I must bow, I should have held that the obligations of owners as to keeping their shafts and pits safe are as clear as the payment of wages to their workmen; but that point is foreclosed, and, moreover, here we do not even know that the stone came from the side of the shaft at all."

The case, then, so far as it goes, comes to this, that in an accident of such a nature, it is necessary, in order to render the proprietors of the pit liable, to show that either (as in previous instances) they

had employed incompetent persons, or that the *construction* of the shaft was defective,—not merely the state in which the shaft was; that would only imply fault on the part of the manager, and the doctrine of *collaborateur* would at once come into play,—it must be a fault of construction, a defect which would thus bring the principals into the field.

There is one point which, so far as we know, has not yet in actual practice been called in question, but if we may venture to judge from certain observations made by the Lord Chancellor in the case of *Wilson v. Merry & Cunningham*, those rules already applied to this branch of law would be sufficient to meet such a difficulty. Suppose in any work or mine an injury were to be caused to one of the workmen by the giving way of machinery, the falling in of a roof, or some such accident, and suppose, further, that this misfortune were clearly referable to the fault of another workman of sufficient skill for his duties, who formerly had been in the same employment as the injured man, but who had at the time of the accident left that employment, would the master in these circumstances be liable? The workman who caused the injury was not at the date when it happened in the position of *collaborateur*; he was a stranger. Lord Cairns suggested such an event merely in order to show clearly in what relation the master and the workman really stand to one another in every question of this kind arising between them, and to point out that the liability of the former did not in any way depend upon the circumstance of the men being fellow-workmen or not; negligence on the master's part is the true test, and having appointed a competent manager, and complied with that manager's requirements, he has done his duty. It would be, we think, a perfectly good ground of action where an injury had been inflicted if the pursuer could show that certain things had been properly represented to the masters as necessary by their managers or foremen, and that those suggestions or recommendations had been put aside or not accepted. Indeed, it is perhaps just at this point that something in the way of legislation may be effected. Of course the manager is very likely to be anxious to keep down expense, may suppress the true state of the case, and make a report look very well when really things requiring immediate attention are neglected. How to remedy this is the difficulty. Government inspection alone will not do it properly, the inspector cannot be constantly down in the mine or pit, and it is notorious that the state of ventilation and so forth varies from day to day, even from hour to hour. Perhaps some method might be devised whereby the workmen employed in any mine or colliery, or even in any particular part of it, would be enabled to make a complaint, and this might take one of two distinct forms; either it might be public, or else it might be made in such a way as to protect the complainers, and to render them safe against pressure by the masters, a penalty being inflicted for frivolous and unnecessary

charges. To consider, then, in the first place, the more public mode of procedure, we should probably find that the representations would take a form akin to a protest on the part of those employed in some particular mine or portion of a mine against the neglect of necessary precautions, say as regards explosive gases or water, or the want of that which is so necessary, especially in collieries, namely, a close attention to the signs of changes on the part of all in authority. Such protests might, of course, be made to the coalowner in compliance with certain forms, copies being also sent to the Government inspector for the district; and liability for the consequences of an accident resulting from neglect after warning might be made to fall upon the master when due examination into the circumstances under which the mishap occurred had sufficiently established a connection between the cause of the complaint and the cause of the accident. Of course the mere protest in itself would be of no avail, for it would never do to place in the hands of either party, whether master or man, an engine against the other; but the protest duly endorsed by the inspector, after his attention had been specially directed to the mine in question, could be easily rendered evidence producible in a Court of Law, and establishing a *prima facie* case against the master who neglected or defied it. No doubt it would be essential to the good working of any such system that the proprietors of these extensive commercial undertakings should be properly protected against imposition and threats of demanding such an inquiry without sufficient ground; but that, we think, could be guarded against by penal provisions proceeding upon an inspector's report to the effect that the whole inquiry had been vexatious and uncalled for. There may be many cases where such an inquiry (although in its result not producing the effects anticipated, that is to say, not ending in the master's being proved wrong and the men right) may nevertheless show well enough that the men had good and sufficient reason for mistrust, and in all such cases, of course, no penal consequences would be permitted to follow.

The present position of the law, founded as it is upon judicial decision rather than upon statute, can scarcely be deemed satisfactory, even were we to consider it from that one point of view; for it cannot be so distinct a matter to the non-professional mind to be told that the decisions upon such and such a question render this or the other point settled law, as to be referred to an Act of Parliament when a doubtful or difficult point arises. Further, it is felt that the province of a judge is not to make law, but to administer it; and, though we know that in reality a good deal of law is made by the Bench from sheer necessity in the absence of any statutory mode of dealing with difficulties which may arise, yet we also know that it is almost always found useful, if not essential, to put the result so attained into accessible, or rather more generally accessible, form by legislative enactment. Very recently the attention, not only of the profession, but of the public generally, has been drawn to this

branch of our law, owing to the widespread sympathy felt in connection with the Blantyre colliery accident. There can be no doubt that there were made in connection with that sad affair allegations against those in authority, that complaints and expressions of mistrust in the condition of the colliery had been poured into ears resolutely deaf, determined not to listen to a word. Whether these allegations were true, or whether they were false, the result of excited feeling after the disaster had overtaken the workmen, it is not for us here to discuss. The very fact that they were made, and made persistently, is sufficient to show the necessity for some further means of check in the questions of evidence as to knowledge arising out of these calamities.

It may be not uninteresting to quote one or two remarks from the Report recently issued, as to the Blantyre explosion, by the Commissioners appointed to inquire into the causes of that fatal accident. There appear, from the observations of the Commissioners, to have been faults both on the part of the managers and of the workmen themselves. Thus we find it said: "Work generally seems to have been pushed on with vigour. On the other hand, representations of danger by the miners are said to have been sometimes rudely received by the oversman of No. 2. The air, after ventilating No. 3 pit, was used for the principal portion of No. 2 instead of fresh air. Open lights were allowed in the return air beyond accumulated gas at the 'stoopings.' Gas (but not within the three months last past) is said to have been on one occasion not fenced off. Batting or wafting out gas, called 'dichting,' disavowed by the manager, was practised. Powder, required to be in a case or canister, was allowed to be taken into the mine at times in paper parcels. Powder, where inflammable gas had been met with during the preceding three months, was allowed to be taken in paper parcels or canisters loose, instead of in the required cartridges. The special rules made each fireman the 'competent person'¹ to supervise the firing of shots where gas had been met with during the preceding three months, but the miners fired their own shots, except at the 'stoopings,' without supervision. Shots, disavowed by the manager as being unsafe near accumulated gas at the 'stoopings,' were fired with an open light by the special fireman. The miners could scarcely have been expected to foresee that the whole system of ventilation was breaking down. But some of them were participators in most of the acts of omission and commission enumerated. Indeed some came forward to admit the firing of shots clandestinely. They also had powers under the Act of which they might have availed themselves. Like those over them, with the exception, perhaps, of one or two, they do not seem to have anticipated a general explosion, and some, at all events, of those who are said to have apprehended this danger remained at work in the pit." From these and similar observations in the

¹ Mines (Coal) Regulation Act, 1872, section 8, sub-section f (1).

Report we see that a good deal of blame appears to have been attachable to owners, manager, oversmen, and ordinary workmen alike. Yet at the same time, from a later portion of the same Report, we learn that the Commissioners were apparently unable to fix, with any degree of certainty, upon the real culprits. They tell us that the facts as to the mine elicited by them present "to some extent an exceptional state of things. According to the evidence no penuriousness (as might have been found accompanying the depressed state of the coal trade) contributed to it. The owners supplied everything that was required. Nearly every man who had any share in the occurrence lost his life. The manager was at his post of duty and got burned. The oversman and all, except one day fireman, lost their lives in one pit, and those of the other pit only escaped as by the skin of their teeth. Notwithstanding what occurred, of all who knew the mine but one or two seemed at all apprehensive of what might ensue. The Inspector of Mines and his assistant had frequently visited the mine, and never complained except to suggest that the men should inspect for themselves. The owners are severe sufferers by the wreck of property, and the expense of, and delay in, restoration. The oversman who lost his life whilst underrating the danger, as has now been proved, stated but three days before the climax, 'There was no fear, there will not be a man fallen in the pit.'"

This shows very well the extreme difficulty in such cases in getting at the truth. Those who know best are invariably among the victims, and the evidence of the relatives and of the officials is extremely apt to be not entirely reliable from a natural and strong, although perhaps unconscious, bias in favour of one or other theory. When, however, we find in this Report the following enumeration of the deviations from the statutory regulations, and when we see that they are deviations by those acting in the management as well as by those working in the mine, the case against the present state of the law is certainly not weakened. These are the enumerated transgressions:—

"Numerous findings of fire-damp in small quantities at points of issue and of accumulated fire-damp at the stoopings were not entered in the report-books, there being only two such entries during the three months preceding the explosion.

"Work was allowed to go on at the stoopings where the ventilation was not adequate to dilute and render harmless noxious gases, as required by the first general rule.

"The ventilation reports were, by a technical mistake of the printer, entered in books under general rule 3 instead of 2.

"The keeping out and withdrawal of miners consequent upon dangerous fire-damp were not entered on every occasion, as required by general rule 6.

"By powder being taken into the mine in paper parcels, contrary to sub-section b in general rule 8.

"By powder being taken into panels of the mine loose in paper parcels and canisters, instead of in cartridges, during three months after inflammable gas had been found in those panels, sub-sections f and g, general rule 8.

"By shots being fired at the stoopings where it was not safe to do so, sub-section f, No. 1 division, general rule 8.

"By shots in other parts of the mine during three months after inflammable gas had been found being fired without the direction and immediate previous examination of the place and the places contiguous thereto, either by the firemen who were appointed to that duty in the special rules or by some other competent person appointed for the purpose, sub-section f, No. 1 division, general rule 8.

"By shots being fired in certain parts of the mine, with the ordinary work-persons not out of the mine or out of that panel of the mine where inflammable gas issued so freely that it fired, and occasionally showed a blue cap on the flame of the safety-lamp; sub-section f, Nos. 1 and 2 divisions, and sub-section b of No. 2, general rule 8."

In the evidence given before the Committee of the House of Commons already referred to, but of which we intend to take further notice hereafter, one witness very sensibly suggested the searching of all miners going down into the pit, to avoid risks of lucifer-matches, powder, etc., being surreptitiously taken down; but in this Blantyre case the section of the Act would seem to have been violated as to powder both at the pit-head or below in the panels. The general impression left by the Report is not to our minds favourable as regards the system of working these "fiery" pits, and we must remember that numerous small accidents occur (that is to say, small as regards the number of the victims) where the glare of publicity is not cast, as it was in this instance, upon every act of the management. The punishment of the owners by way of fine has, to say the least of it, not been a success, and it seems almost necessary to look for other remedies. As to the question so far raised, and raised at Blantyre also, of warning by the men, we have ventured to suggest one mode, which at least would have this merit, that the truth must be known; it would not be possible afterwards for any question to arise whether there had or had not been complaints and warning. If in this Blantyre accident there had really been representations made to the officials and no attention was paid to them, they were guilty of most culpable neglect; but if, on the other hand, nothing of the kind took place, then the survivors could not have been in doubt, the error in blaming those who were innocent could not have been made. At present we have no sufficient machinery for preserving records of such complaints; and for enabling them to reach the ears of an inspector in proper shape, what arrangements there are in the books kept at the pit-mouth are quite inadequate.

Some change in the direction indicated would probably give considerable means of relief in questions of difficulty, especially when combined with the mode of dealing with this branch of law which has often been suggested. Those who advocate this plan are in favour of the imposition of a liability upon employers of labour for the acts of those placed by them in a position of authority. The remedy at first sight appears very simple, but the simplicity is considerably diminished when we proceed to ask one of the very first questions suggested by such an enactment, Who are meant by those placed in a position of authority? To draw a line of definition would be extremely difficult, and the result could hardly in any case be absolutely satisfactory. A mere shade of difference must and does exist between the grade where authority begins and where the relations of two men as *collaborateurs* cease. When a man hires himself to mine or work coal, or to do anything of a dangerous character, he does so wittingly; and he must be supposed to be aware of and be ready to face the ordinary and usual risks of the work he has undertaken, but he does not contract to run the gauntlet of carelessness and neglect on the part of those who have the management intrusted to them, nor would we think it be reasonable by statute to enforce this view. It is very frequently a question of circumstances, and these are by the present state of the law summarily disposed of. Probably the sounder, the safer, way is to seek not merely to extend the liability, defining by statute its limits, but also by stricter requirements as to efficiency in the works, and by readier methods of bringing forward and of recording complaints on these matters by the men, to give to workmen that amount of protection to which they are entitled.

The remarks we have already made as to the public protests by the men, and the largely increased importance they would obtain, tend in this direction; but there might be also another and more secret mode of warning more particularly valuable to the Inspectors of Mines, to which we propose to call attention as a suggestion for remedial legislation, and having done that, we may more carefully consider the proposal for enlargement of an employer's liability and the statutory limits within which the exigencies of trade would require any such enlargement to be fenced.

So far, then, we have considered these protests as open public things; but there may be often cases in which it is necessary to give secrecy in order to obtain full and correct information, and in these instances the foregoing method would not answer. We should, however, propose to have each week or each month a statutory form presented, as we are about to explain, to every miner, to be filled up by him in accordance with the views he held as to the works. We remember, when speaking of the proposal to a man who had been for many years an underground manager in a colliery, that he at once pointed out the impossibility of getting true statements from the men, because they would be afraid of the consequences of

making complaints: the owners or their managers would, even to put it most mildly, not be inclined to employ men who made these complaints, and fear of thus getting the character of a grumbler would be sufficient to prevent remonstrances or warnings by the employés, even when such hints of what was going on might be most valuable to those in authority. Therefore, it would be necessary to protect these notes, when made by the men, in such a way as to secure absolute secrecy. This object might be attained probably by using for the reception of the brief reports a ballot-box, accessible only to the Inspector of Mines, and on the model of those employed in parliamentary and municipal elections. Then it might be made imperative on colliery owners to have books kept at the pithead containing the names of each collier employed, with a reference number thereto attached, and to supply to the Government Inspector for the district a duplicate of this book. This reference number would also appear on the slip placed by each collier in the box on his reaching the pithead once in every month, or perhaps each week before receiving his pay. Now we see that in the practical working out of such a plan, the collier at the statutory time would, on arriving at the surface, immediately receive from the proper official a printed slip containing his number in the workman's list of the pit, and also a descriptive number or means of identifying the particular colliery and working or level in it where the man was employed. There would be a blank space upon the slip for any remarks. The ballot box or boxes would be kept in a separate and secret place, where there would also be means for writing upon the slip. Each workman would enter singly and alone to place his slip in the box after writing upon it any favourable or unfavourable observation relating to the mine, or else he might simply place it in the box without in any way marking it. Suppose, then, in any given pit there were, say one hundred men at work, the box, after the men had come up from the workings on the fixed day in every month or whatever the statutory period might be, would contain one hundred slips, each bearing a number, but capable of identification only by a comparison with the colliery-book kept at the office, or with the duplicate of the same in the hands of the Government Inspector. The identification in the case of the books kept at the colliery office would never take place, because the box containing the slips would be at once sent to the Inspector, or remain unopened and accessible only to him on the occasion of his periodical visits; and as regarded the Inspector's means of identifying the communications with certain men, it might be expressly forbidden until subsequent inquiry had proved the allegations to be not merely unfounded but absolutely without reasonable grounds. If it were found, as it probably would be in well-regulated coal or mineral workings, that the nature of the complaints or warnings was trivial, and if their number were very small, as to the presence, for instance, of fire-damp or water, or as to the state of the

shaft or roof, no action would follow; but if, on the other hand, the Inspector, from the remarks made by the workers, found that there was a general or even a considerable degree of alarm felt by the men upon some particular subject in any colliery, then he would address a warning to the pit owners, and would himself proceed to a careful inspection, making a report upon the whole condition of the workings visited, and sending a copy of this report to the pit owners. In any subsequent inquiry that report might be produced, and would form an important item in the evidence as to knowledge of natural causes of danger or defective arrangements on the part of the employer of labour. The boxes containing the slips, it should have been mentioned, would require at every statutory interval to be removed and their contents privately examined by the Inspector, by whom the slips would be permanently retained. It is evident that unless it were made compulsory on all the workmen to place a slip in the box, whether blank or not, those who were known to have placed them there might become marked men, and it would further be necessary as a protective measure to provide for the destruction of the slips so soon as the necessary legal evidence of the state of the workings were forthcoming in the shape of the official report by the Inspector. In this way, unless he were maliciously stating what was false as to the condition of a pit, any miner would be perfectly secure in making a statement, and by warnings indicating his fears of danger to the lives of himself and his fellow-workmen. It would only be known that some one had made complaints, but who was the fault-finder out of so many workmen it would not be possible to tell.

It may perhaps be urged that all this machinery would be really directed against the masters, and might tend to place them in a position of positive disadvantage; and again, it may be said that there would be no proper means of protecting these protests, or whatever else they are termed, against abuse, and that the men might make extensive use of them to forward other trade purposes, as, for example, to hamper their employers at critical times, during a strike, during periods of depression in trade, and so forth. No doubt, objections based upon these grounds have so far some force, and lead us to consider the checks necessary to meet such abuses. First of all the Inspector, if he proceeds to the mine or working, and finds the whole allegations made by the men to be utterly without foundation, has the means in his own power of ascertaining the names of those who have misused the trust confided to them. The slips having stamped upon them the individual number belonging to each, the protesters are in his hands, as well as the duplicate book giving the names corresponding to the numbers; and where such allegations had been recklessly made, means of publication could be provided, after which the owners might take their own measures against their calumniators. No one, however, but the Government officer himself could exercise such a power, he

alone having the means of detection. It perhaps might even be found necessary to inflict punishment in aggravated cases; but of course no names would be divulged, and no measures, penal or otherwise, taken against the men who had complained, where there was in the opinion of the Government official some kind of *prima facie* ground for the complaint, even though on full inquiry it turned out to be void of real foundation. When we think of the heavy losses (entirely apart from questions of compensation) suffered by the owners of a pit suddenly flooded by water, or damaged by explosion, it will be seen that these measures of a remedial character would, by forewarning them, in many instances avert the impending catastrophe, and prove a lasting benefit to them. At present, no doubt, a collier can make a complaint, and speak of the state of matters below which has led him to draw inferences unfavourable to the safety of the workmen and the working; but it frequently may happen that there is little attention paid to such remarks, and they are perhaps oftener made by one man to his mate than properly brought under the manager's notice. The manager gets reports of how things go from his subalterns, and their object is, like his, to make the pit pay as well as possible. Under a changed system, however, the men, when they went in at fixed periods to place the slips in the box, would feel that they were, in point of fact, submitting a report to the high officer of the State, and would think probably carefully over the practical observations made during their work of the preceding week. Their remarks would be expressly confined to those technical matters with which they were daily brought into contact, and no other subjects would receive any attention. It may be added here, that in not a few instances accidents have been caused by the folly and recklessness of workmen themselves,—by blasting, for example, where it was expressly forbidden, or by the use of naked lights. In many cases these derelictions of duty might become known to an Inspector through information supplied on the slips by the more cautious and prudent of the men,—a matter of course vital as regards the protection of human life, though not affecting the question of liability between master and man. We venture to think that it would not be long ere some such system might be found to work well in the truest and best interests of all concerned.

There would in this way be two means of checking mismanagement and its dangerous consequences in mines and coalpits,—either remonstrances in the monthly statements of the workmen confirmed by the Inspector's subsequent and resulting visit and his report, or else the open and simple procedure by way of protest and complaint served upon the master by the men, and similarly endorsed by an Inspector. The former method would most likely lead to the discovery of more occult dangers in certain parts of the workings, the latter to more general matters affecting the whole pit, such as the ventilation, supports, etc.

Thus far we have considered remedial measures for the better securing miners against neglect on the part of those in authority to pay due attention to warnings and complaints, and we shall next turn our attention to the proposal for extending the existing limitations in the liability of masters for the acts of persons placed by them in positions of subordinate authority.

(To be continued.)

THE LIABILITY OF RAILWAY COMPANIES AS CARRIERS OF PASSENGERS' LUGGAGE.

(From the "Law Times.")

It seems now to be settled law that, subject to statutory exemptions, railway companies are common carriers, and therefore insurers, of passengers' personal luggage, which they are bound to carry free of charge. In *Macrow v. The Great Western Railway* (L. Rep. 6 Q. B. 618), Chief Justice Cockburn, in delivering the judgment of himself and Justices Blackburn and Mellor, said: "The law is now too firmly settled to admit of being shaken, that the liability of common carriers in respect of articles carried as passengers' luggage is that of carriers of goods as distinguished from that of carriers of passengers; unless, indeed, where the passenger himself takes the personal charge of them, as in *Talley v. Great Western Railway* (L. Rep. 6 C. P. 44), in which case other considerations arise." In the case of *Cohen v. The South-Eastern Railway* (2 Ex. D. 253), where it was held by the Court of Appeal that luggage carried for a passenger without extra charge is within sec. 7 of the Railway and Canal Traffic Act, 1854, Lord Justice Mellish said: "Whether the defendants are common carriers, subject to the liabilities in respect of carrying passenger traffic, I do not think it necessary to determine; but, upon the authorities cited to us, it seems to me that they are subject to the liabilities of common carriers for the loss of passengers' luggage."

It seems to be equally clear that this absolute liability may be modified where the passenger takes such personal control and charge of his luggage as to raise an implied condition that he shall himself take reasonable care. This proposition is thus put by Mr. Justice Willes in the case of *Talley v. Great Western Railway Company* (L. Rep. 6 C. P. 49): "It is obvious," said the learned judge, "that with respect to articles which are not put in the usual luggage-van, and of which the entire control is not given to the carrier, but which are placed in the carriage in which the passenger travels, so that he and not the company's servants has *de facto* the entire control of them, the amount of care and diligence reasonably necessary for their safe conveyance is considerably modified. To such a state of things the rule which binds common carriers absolutely to insure the safe delivery of the goods, whatever may

be the negligence of the passenger himself, has never, that we are aware of, been applied." This proposition is also conceded by Chief Justice Cockburn in the remarks we have already quoted, as well as in the case of *Le Conteur v. London and South-Western Railway Company* (L. Rep. 1 Q. B. 54), to which we shall have reason, later on, to refer at some length.

So far the law is clear, but upon this second proposition a question arises which is of much greater difficulty, and one upon which there seems to have been until a few days ago no conclusive decision, although many strong expressions of opinion are to be found on it. This question is, What constitutes an entire personal control on the part of the passenger sufficient to absolve a railway company from their absolute liability as insurers? Does the passenger, by taking his luggage in the carriage with him, *ipso facto* exempt the company from such liability? It will be seen above that Mr. Justice Willes was of opinion that he does; but the Court of Queen's Bench, as we shall show later, answered the question by a decided negative. On this point the Court of Appeal delivered a very important judgment on the 15th Jan., in the case of *Berghem v. The Great Eastern Railway*. The plaintiff in that case took first-class tickets for himself and his wife on the defendants' railway, from Liverpool Street to Great Yarmouth, and put his bag into a carriage for the purpose of securing a seat. He asked a porter whether it would be safe, and the porter answered that he would be there till the train started, and the bag would be safe. The plaintiff and his wife then went to the refreshment-room for luncheon, and upon their return to the carriage the bag was missing, and was never again heard of. At the trial before Mr. Justice Manisty the jury found that neither the plaintiff nor the defendants had been guilty of negligence, that there had been no felony by the company's servants, and they assessed the value of the bag, which they found was not within the Carriers Act, at 32*l*. On these findings, judgment was entered for the defendants, on the ground that they were not, under the circumstances, liable as common carriers and insurers. This judgment was, upon appeal, affirmed by the unanimous judgment of the Court of Appeal. Lord Justice Cotton, in delivering the judgment, said: "As the jury have found that there was no negligence on the part of the defendants, the plaintiff could not possibly recover, except on the ground that the defendants were absolute insurers of the property lost. But, inasmuch as the liability of a common carrier as an insurer arises from the fact that the goods committed to him are for the time in his exclusive possession and control, and as in the case of a passenger's luggage placed by him in a railway carriage such exclusive possession and control is not given to the company, they would not therefore be liable as absolute insurers. Their liability as carriers does not in such a case absolutely cease, for they would be liable for a loss by their negligence; but in the present case such negligence has been negatived."

This decision appears to us to proceed somewhat further than the interests of the company demand, and to trespass a little unduly upon the convenience and requirements of the general public. No doubt a passenger may so conduct himself as to warrant the conclusion that he reserves complete control over the luggage himself; but to say that the mere fact of his placing his bag in a carriage with the consent of the company is sufficient evidence to warrant this conclusion, is to go much further than any decision we have yet heard of. It is the general practice for passengers to take light personal luggage in the carriage with them. This practice is always assented to by railway companies, being, as it undoubtedly is, for the general convenience. But if a passenger is not allowed, when leaving his carriage for a few moments, to leave his carpet-bag behind him, he will perforce have to carry it about with him wherever he may go for every instant of time. Under these circumstances it seems to us that the evidence of an exclusive control on the part of the passenger should be very strong to entitle the defendants to exemption from their ordinary and absolute liability as common carriers. We are strongly supported in this view by the judgments of the Court of Queen's Bench in the case of *Le Conteur v. The London and South-Western Railway Company* (reported in L. Rep. 1 Q. B. 54). There the plaintiff, on arriving at the railway station, went with a chronometer in his hand up to one of the defendants' railway carriages which formed part of a train then ready to start to London, and gave the chronometer to a porter of the defendants, who then, in the presence of the plaintiff, placed it on the seat of the carriage. Both the porter and the plaintiff immediately after this left the platform together, the porter to attend to other duties, and the plaintiff to look after the rest of the luggage, which had not arrived from the Customhouse. The plaintiff remained absent for some ten or fifteen minutes, and when he returned the chronometer was not to be found. The question came before the Court of Queen's Bench on a case stated by an arbitrator, the principal defence raised by the defendants being under the Carriers Act; but the question as to whether the plaintiff withdrew the chronometer from the custody of the company was also much considered. It will be observed that the facts in that case were in substance the same as those in the case before the Court of Appeal, the only difference being that in the one case the porter placed the chronometer in the carriage; in the other the plaintiff himself placed his bag there in the presence of the porter.

The remarks of the Lord Chief Justice of England in this case are so pertinent to the question we are discussing, and bear out so strongly the view for which we contend, that we think we shall not be taking up unnecessary space if we quote him at some length. He said: "I think it appears that what took place was this, that by the desire of the plaintiff, the porter of the company placed this article in a carriage, in which a particular seat was to be appro-

priated to the use of the plaintiff. I am very far from saying that there may not, in these cases, sometimes be a state of circumstances in which a passenger who has luggage which, by the terms of the contract, the company are bound to convey to the place of his destination along with him, may not release the company from their obligation as carriers for the safe custody of the article by taking it into his own personal custody and charge; but I think the circumstances must be strong to relieve the company from their liability. It is not because the article that is part of the passenger's luggage to be conveyed with him is, by the joint consent of the passenger and the company, placed in a carriage with him, that the company are necessarily released from their obligation to carry safely." That is all the evidence there was, it will be remembered, in the case in the Court of Appeal, which we are discussing. "Nothing," he proceeded, "could be more inconvenient than that the practice of placing small articles, which it is convenient to the passenger to have with him in the carriage, should be discontinued; and if the company were, from the mere fact of articles of this description being placed in a carriage with a passenger, to be at once relieved from the obligation of safely carrying such articles, it would follow that no one who has occasion to leave the carriage temporarily would be able to leave them with any degree of safety." He went on to say that the Court would require very special circumstances indeed, circumstances leading irresistibly to the conclusion that the passenger had, in fact, taken such personal control and charge of his luggage as to altogether give up all hold upon the company, before it can be said that the company, as common carriers, would not be liable in the event of the loss.

This view of the law does not rest with the Chief Justice alone. Justices Mellor, Shee, and Lush thoroughly concurred in this view. "It cannot be said," said Mr. Justice Lush, "that the things are not in the custody of the company as carriers because they agree, at the passenger's request, to place them in the carriage where he sits;" and all the other judges expressed their views with equal decision. It may be said that these remarks were unnecessary for the decision of the case, and that is to some extent true, inasmuch as the judgment was given on another point; but this was a point which was much discussed in argument, and therefore well before the Court. In the case of *Talley v. Great Western Railway Company*, Mr. Justice Willes, alluding to this case, distinguished it on the ground that there was evidence of negligence on the part of the company's servants; but that does not appear to be so; nor is that case in reality any authority against the view taken by the Queen's Bench Division. All it shows is that circumstances may exist under which the passenger must be taken to have assumed the entire control over his luggage—a proposition accepted to the full by the Lord Chief Justice—but it goes no further. On the

other hand, we find the case of *Richards v. London, Brighton, and South Coast Railway Company* (7 C. B. 839), which seems to go to this, that unless such a state of things can be implied from the circumstances of the case, the general liability of the company will continue. There are other cases on the subject, but they are cases in which negligence was proved, and therefore beside the question.

The decision of the Court of Appeal, however, is of course conclusive. By that decision the law is laid down thus: that if a man takes his personal luggage into a carriage with him, he thereby exempts the railway company on whose line he is travelling from their absolute liability as common carriers. But it is important to bear in mind that the company will not in such a case be absolutely freed from all liability, but will still be liable if negligence is proved.

Reviews.

A Compendium of Roman Law. By GORDON CAMPBELL, of the Inner Temple. London: Stevens & Haynes. 1878.

ALTHOUGH Scotland for very many years has been able to boast of jurists who have been no mean expositors of the Civil Law of Rome, it is only within a very recent period that much attention has been bestowed upon it in England. Now, however, it is indispensable for admission to the Bar there, and the law degrees of the universities. The knowledge of students must of course be tested by means of examinations, and examinations, though good enough in themselves, are productive in these days of the system of "cramming," a system which by long experience has been reduced to a wonderfully complete art. On the evils of the system itself we cannot here be expected to enter; it is a fact that it exists, and as it exists to such an extent as it does, it is impossible not to acknowledge it. The book before us does not pretend to be anything more than a "cram-book;" so much may be gathered from the title-page, which, in full, runs thus: "A Compendium of Roman Law, founded on the Institutes of Justinian, together with Examination Questions set in the University and Bar Examinations (with Solutions), and Definitions of leading Terms in the Words of the principal Authorities." This is certainly a wide enough field, and we are bound to say that Mr. Campbell has covered it not unsuccessfully. Besides condensing the substance of Justinian, he has given us alongside of it criticisms, objections, and observations, culled from the works of various standard writers on the Civil Law, such as Austin, Maine, Green, and others. We miss, however, the name of Professor Hunter, whose elaborate work on Roman Law, published two years ago, might have given the author many a useful

hint. The plan of the book follows, of course, the order of Justinian, the various titles being clearly and methodically condensed. It would be wrong to say that Mr. Campbell's work is one to be recommended for the use of the student who is only beginning the study of the Roman Law, but for the purpose of presenting, in a clear and summarized form, the results of study, it is worthy of praise. Not the least useful part of the work, especially from an "examination" point of view, is the appendix, which indeed occupies half the volume. In it are given upwards of a hundred questions in Roman Law, mainly taken from papers set at the different universities of the three kingdoms, and at the English Bar Examinations. Each question is accompanied with a full and complete answer, and we can only say that if the student is able to answer all the questions contained here, he may go up for any examination in a pretty comfortable state of mind. The volume concludes with a list of definitions and descriptions of the leading terms met with in Roman Law, which the anxious student may commit to memory, and arm himself withal. Some of these definitions are given in the words of the Institutes themselves, others are taken from the works of the different authors on the subject.

In conclusion, we have said enough to show that this book, while not professing to supply the place of a careful and scholarly treatise on the Civil Law, yet is well suited for the purpose for which it is written. Not only may students derive benefit from its perusal, but examiners may take a hint from the class of questions given in the appendix.

Criminal Procedure in England and Scotland. By the Hon. ARTHUR D. ELLIOT, Barrister-at-law. London: William Ridgway. 1878.

MR. ELLIOT is an English barrister of a good Scottish family, and may therefore be supposed to possess a pretty accurate knowledge of criminal procedure in both countries. Two systems more opposed to each other in principle and practice could hardly be conceived, and Mr. Elliot has written a very interesting and suggestive pamphlet, in which he points out what he considers to be the faults and the advantages of each. There is no doubt that, however much our English brethren may be unwilling to admit the fact, the legal procedure and organization of the South is under much greater obligations to the law of Scotland than the latter is to English law. The concurrent jurisdiction, both in law and equity, which our courts possessed from their commencement, has only been recently introduced into the English tribunals, while the subject of the expediency of making a radical change in the system of criminal procedure by the appointment of a public prosecutor corresponding to the Lord Advocate, is one which has been now discussed for some time with much interest. The supporters of

such a measure appeal to its excellent effect in Scotland, while its opponents argue that it is subversive of that liberty of the subject and spirit of fair-play towards an accused which is so characteristic of the English nation. Mr. Elliot discusses the subject temperately and with judgment. Let us here briefly indicate the more important of his views, and the conclusions at which he arrives. The writer defines the qualities which a good criminal procedure should possess, by saying that it should secure, in the first place, justice; secondly, the sympathy of the public; thirdly, celerity, economy, and public convenience. For the English system the first and second of these qualities are claimed, while it is shown that the last requisites are almost entirely sacrificed. The lengthy investigations before the committing magistrate in cases of importance really amount to a trial of the facts, while the nominal result is merely the committal of the prisoners, but with a great amount of prejudice excited in the minds of the public, and probably in the minds of the very jurymen upon whose verdict the acquittal or condemnation of the accused ultimately comes to depend. The same objection applies to the coroner's inquests, which, as in the Bravo case, sometimes involve in an indirect and awkward manner the question of the guilt or innocence of parties who have no legal right to defend themselves, and whose subsequent defence cannot fail to be prejudiced if a verdict inculcating them be found, and whose character may be unjustly injured by a verdict upon which no prosecution is undertaken. Notwithstanding these objections, Mr. Elliot is not prepared to substitute for the English system the secret inquiry which forms one of the most prominent features of the Scotch criminal procedure, partly on the ground that under the open system a man has the opportunity of knowing all that is to be said against him, and partly on the ground that the public are satisfied, where the magistrate does not commit, that the accused is innocent, while under the Scotch system no one knows upon what grounds the authorities have proceeded in resolving not to prosecute. In support of this view he quotes a single case of a policeman whose prosecution was ordered, although the Crown authorities were convinced of his innocence, in order to satisfy the public suspicions. It seems to us that this might occur as well under an open as under a secret system, and that people would differ as to the decision of a magistrate, even though the evidence were taken in Court, just as they did as to the action of Crown counsel in the case cited, with this addition, that they would be able to point to imperfect newspaper reports as justifying their views. There can be no doubt that the Scotch system saves many persons from the cloud of suspicion which lingers round those whom a magistrate has only with hesitation refrained from committing. At the same time, Mr. Elliot is fully conscious of the defects of the English system of preliminary inquiry, and the reforms that he proposes—viz., the abolition of

grand juries, except in political cases; the substitution of an investigation before an official appointed by the Crown for the present cumbrous and unsatisfactory inquiries before a coroner and a jury; and, lastly, the shortening of the inquiry before the magistrates—are all steps in the right direction, but do not meet the objections which we have indicated.

In regard to the question of the institution of a public prosecutor for England, Mr. Elliot is strongly of opinion that the Scotch system ought to be imitated, and he quotes the dissent of Sir Alexander Cockburn from the report of a Committee of the Royal Commissioners which is appended to the fifth report of the Judicature Commission, and in which his Lordship expresses strongly his preference for the Scotch system over the modified plan, which the majority of the Committee favoured, and which limited the duties of public prosecutors to the conduct of cases only *after committal*, and laid down the general rule, that the public prosecutor should not intervene in the earlier stages of a prosecution. Under this plan the main advantage of a public prosecutor is lost, for it is just in the preliminary stages that injustice is likely to be done to innocent persons, and that mistakes are likely to be committed which may lead to the escape of the guilty.

Among other valuable suggestions made by Mr. Elliot, is one to the effect that legislation has gone too far in the way of allowing offences to be tried summarily without a jury, and he thinks that in this respect we should retrace our steps. He is, however, rather extreme when he suggests that "the right principle that summary jurisdiction should be limited to those cases where the magistrate has only power to fine;" but, as was recently pointed out by Mr. Stephen in the *Nineteenth Century*, the number of cases affecting the liberty and reputation of the subject which are now tried summarily has immensely increased, and this increase constitutes a real danger in the administration of justice, for in such cases the chances of miscarriage are certainly greater than in more trials, and the injury to the individual may be quite as irreparable. Mr. Elliot also points out forcibly the objections to the present mode in which the prerogative of mercy is exercised, and still more strongly to the institution of Courts of Appeal in criminal cases as not required, owing to the difference between civil and criminal cases, and as likely to lessen the sense of responsibility which criminal juries at present feel, at least in capital cases; but we scarcely think that the cases which the Home Secretary will be called on to consider are likely to be fewer, even if the three suggestions with which the pamphlet closes are carried out. These suggestions are—the introduction of a real system of public prosecution, the simplifying and shortening of preliminary investigations, and the raising the quality of the court which tries criminal cases.

Mr. Elliot's pamphlet is a useful contribution to the cause of law reform.

Obituary.

ARTHUR BURNETT, Esq., Advocate.—We have this month to record the death of the above-named gentleman, which took place on the 3rd of February, in his eighty-first year. His name, at the time of his death, stood sixth on the list of surviving members of Faculty, and he was a good specimen of the old school of Scottish Advocates, a race, alas! now fast passing away. Born towards the close of last century, he was called to the Bar in 1819, in the days when the Parliament House was in the zenith of its glory. Professional advancement did not, however, come to him very rapidly, although in that respect his case was not an exceptional one; he was, indeed, the traditional “rising junior of forty” when he accepted the office of Sheriff-Substitute of Peeblesshire, and in that unambitious though honourable position he did the best of his life’s work, performing the duties of his office there for a period of thirty years acceptably and conscientiously. His genial and social character made him a universal favourite in the county, and his society was much esteemed by all with whom he came in contact. He lent a ready ear to any tale of distress or want, and his purse was ever open to the deserving poor. Always fond of polite literature, his attainments in classical scholarship were of no mean order; but it was as a true friend and delightful companion that he was best known and appreciated. A keen and skilful curler, his figure was a familiar one on the icy rink, and his voice and arm have directed many a well-laid stone; his attachment to and love of children were a conspicuous feature in his character, and served to show in a very striking manner his simplicity of heart and warmth of disposition. In politics he was a Conservative of the old school, but there was nothing narrow or illiberal in his political views; an admirer of everything good and noble in every man, whatever his station, he was equally a hater of everything that savoured of meanness or double-dealing. He resigned office about 1868, and spent the latter years of his life at Venlaw Bank, enjoying the love and esteem of a large circle of friends. Of him may be truly said that

“He sought not praise, and praise did overlook
His unobtrusive merit; but his life,
Sweet to himself, was exercised in good
That shall survive his name and memory.”

CHARLES STEWART, Esq., Solicitor, whose death we have to announce, was a native of Inverness, born on 19th May 1810, and educated at the Royal Academy there, in which he carried off the gold medal in 1824. He began his professional career in the office of the late Mr. Shepperd, one of the principal solicitors in Inverness, and afterwards pursued the usual course of study in Edinburgh.

In 1829 he was admitted a procurator before the Sheriff Court of Ross-shire, and in 1830 he returned to Inverness. Beginning practice in Inverness, he entered into partnership with Mr. Colin Chisholm, who afterwards removed to Ireland, but died about a year ago in Banff. As a solicitor, Mr. Stewart gradually obtained successful practice. He was acute and persevering, with that readiness of speech essential in court practice, and which also enabled him to be effective in ecclesiastical cases. He was considered a good Church lawyer, and in 1839 he particularly distinguished himself in what was known as the Daviot and Dunlichity case. Being connected with the question of the Church's independence, then, as still, eagerly discussed, the Daviot case attracted much attention. It is referred to by Sir Erskine May in his "Constitutional History of England." The Crown had presented Mr. Simon Mackintosh to the living of Daviot and Dunlichity, in Inverness-shire; but several parishioners who had been canvassing for another candidate, whose claims they had vainly pressed on the Secretary of State, prepared to exercise a veto. As such a proceeding had been pronounced illegal by the House of Lords, Mr. Mackintosh obtained from the Court of Session a decree interdicting the heads of families from appearing before the Presbytery and declaring their dissent without assigning special objections. Mr. Charles Stewart espoused the cause of the dissentient parishioners, and fought the case before the Presbytery here, opposed by another keen and able Inverness lawyer, Mr. Alexander Mactavish. Mr. Stewart was successful. He succeeded in getting the people's petition read before the reverend court, and thus brought before the eye of the public; and the case being then transferred to the General Assembly, was absorbed in that storm of Non-Intrusion excitement and controversy which preluded the unfortunate Disruption of 1843. In the proceedings connected with the Daviot presentation, Mr. Stewart gained golden opinions for his acuteness, knowledge of Church law, and fluency in debate, and was ever afterwards much employed in Church business. He was himself a staunch adherent of the Established Church, and for many years represented the Inverness Presbytery as their ruling elder. His subsequent career was one of uninterrupted prosperity. When the railway enterprise sprung up in the North he was actively associated with it, and was appointed agent for the Highland Railway. He was agent for the town of Inverness during a period of about fifteen years, resigning the appointment in 1876. For ten years he was law-agent for the Caledonian Bank. He was appointed joint agent for the National Bank in 1861, and Procurator-Fiscal for the county in 1862, resigning the latter office in 1876. When the late Lord Lovat was nominated Lord-Lieutenant of Inverness-shire, he appointed Mr. Stewart as General Clerk of Lieutenancy, and that office he held till his death. Various other local honorary appointments were conferred upon him as opportunities arose. His legal brethren gave

him their highest mark of distinction, making him Dean of the Faculty of Procurators in Inverness. There was no public matter of interest in which he was not more or less engaged. His talents for business, and his reputation for honour, prudence, and consistency, secured him the confidence and esteem of his townsmen, and of a wide circle of clients and friends. To lessen the pressure of ever-increasing business, Mr. Stewart early assumed as partner Mr. William Taylor Rule (1854), and afterwards Mr. William Burns, thus constituting the firm of Stewart, Rule, & Burns, so well known in the north of Scotland. His success also enabled him to assume, what every Scotchman prizes highly, the position of a "heritor," or landed proprietor. He purchased successively several small estates—Dalcrombie, Brin, Tullich, and Elrig, all in Inverness-shire; and Glenrossal, in Sutherlandshire. The immediate cause of Mr. Stewart's death was congestion of the lungs. He had been in Edinburgh transacting some business, and caught cold. There was no appearance of danger till the day preceding his death. On Sunday the symptoms became alarming. Mr. Stewart rapidly sunk, and quietly expired at noon, on Monday the 11th February.

Mr. Stewart was twice married—first in 1862 to Miss Macpherson of Glentruim, by whom he had two children, a boy and a girl; and in 1872 to Miss Ellen Rew, of London, who, with the children, survives him.

The Month.

Law Fellowship in University of Edinburgh.—At the last meeting of the Edinburgh University Endowment Association it was resolved, on the motion of Mr. D. Crawford, Advocate, seconded by Mr. D. Smith, W.S.,—"That a sum of £300 of annual funds be appropriated to the support of a competitive Scholarship in the Faculty of Law of £100 a year, subject to the conditions usually attached to Scholarships by the Association."

As this is the first inducement of a pecuniary kind which has been offered to the students of Law in any Scottish University to carry their studies beyond the mere requirements of the different professional bodies, it is desirable that the conditions on which it is to be competed for should be made known as soon and as widely as possible.

These conditions, which will no doubt be printed at length in the Calendar of the University, are in substance as follows: the Scholarship is to be called the Edinburgh University Endowment Association's Law Fellowship (this being deemed a more appropriate name for an honour for graduates); is to be of the value of £100 a year, and to be tenable for three years, and is to be open to competition to Bachelors of Laws (LL.B.) and Bachelors of Law (B.L.) in the University of Edinburgh of not more than

five years' standing at the time of the competition. It is to be awarded to the competitor who shall present the best thesis on a subject comprised within the course of study required for the Degree of Bachelor of Laws (LL.B.) in the University; but any competitor who has published an original treatise or original writings on such a subject may present such treatise or writings instead of a special thesis. The thesis, treatise, or writings presented for the competition are to be lodged with the Dean of the Faculty of Law on or before 31st October 1879. The examiners are to be the Professors and Examiners in the Faculty of Law, who are to have power, in case they consider no competitor has sufficient merit, to report that the Fellowship shall not be awarded, in which case it is to be again open for competition in 1880.

The successful candidate is to be bound to give a course of not less than six lectures in each of the second and third years of his tenure of the Fellowship, on some subject of law to be approved of by the Law Faculty.

As the first competition is to be in the end of October 1879, this Fellowship will be open to Law graduates of 1878 and 1879, as well as to those who graduated in 1875, 1876, and 1877.

Advocates' Widows' Fund.—At a meeting of contributors to the Widows' Fund of the Faculty of Advocates held on Wednesday the 20th February it was resolved that, having considered the Report of the seventh septennial investigation into the affairs of the Fund, and the Report of a Committee appointed under a remit of 9th January, "the meeting approve of the alternative scheme suggested in the Actuaries' report, by which the children of members of Faculty may be admitted to the benefits of the Fund, and remit the matter of new to the former Committee, to consider what may require to be done to carry this into effect, and to report." There is, we believe, a very considerable surplus at the disposal of the Fund, and we are sure no better way of utilizing this money could be found than by making a provision for the minor children of a deceased member whose wife happens to have died before him. A new Act will of course have to be applied for, but we confidently expect that it will meet with no opposition.

State of Crime in Edinburgh.—The recent mysterious occurrence in one of the most frequented streets of the Scottish metropolis, which has resulted in the death of an eminent artist, must be our excuse for briefly alluding to the above subject. The daily press has been deluged with letters from correspondents pointing out, often from personal experience, the risks which the unfortunate wayfarer runs in traversing the streets of Edinburgh both by day and night. It remains to be considered how those risks have within recent times increased to so large an extent, and what can be done to prevent the recurrence of crimes so daring and atrocious as those of which we have lately been informed. In the

first place, we think there is little doubt, however much it may be to the interest of municipal dignitaries and the local press to assert the contrary, that the police force is in a very inadequate state both as to numbers and efficiency. As to numbers it compares very unfavourably with some other large towns: during the year 1876-77 the number of constables in Edinburgh was 348, being one to every 566 of the population, *as calculated at the census of 1871*. This, however, cannot represent the true proportion as at present existing, because Edinburgh has increased in a most remarkable degree both as regards population and local extent since the last census was taken. It must also be remembered that these 348 constables represent both the day and night force; so that, allowing for absentees and men on the sick list, we have little more than 150 men on duty at one time. Surely this is too small a number to secure the efficient watching of a town which covers such an extent of ground, and contains in many places such a crowded population, as Edinburgh does. If we compare these figures with similar ones relating to London, we find a very marked difference. There the proportion of police to the population is as 1 to every 399; while in the City proper there is 1 policeman to every 94 inhabitants, which, allowing for the fact that there are very few "inhabitants" in the City, brings up the proportion considerably. No one, too, who has compared the police force of Edinburgh with that of other large towns can fail to be struck with the utter want of smartness and "setting-up" which is conspicuous in it. Its duty, if done at all, is done in a very perfunctory and haphazard way. Graver charges, too, have been whispered against it, but these are unsuited to the pages of a professional journal; meanwhile it is undeniable that while there are doubtless many able and good constables in the force (though it is said that the best men never stay long, but merely use their term of service in Edinburgh as a stepping-stone to better appointments), it is very far from coming up to the standard of what the police in the chief city of Scotland ought to be.

Let us, however, leave the thankless task of fault-finding, and consider what can be done to stop the future perpetration of assault and robbery in our streets, or at least prevent its occurring with such lamentable frequency. When the garroting "scare" took such a hold of the minds of the London public about fifteen years ago, attention was drawn to the best mode of putting down the evil. Acts were passed empowering judges to sentence criminals convicted of robbery with violence to long periods of penal servitude, but it was found that even such strong measures failed to prevent the crime: it was not until the passing of the Act 26 & 27 Vict. cap. 100, that matters were really improved. By that statute power was given to courts, in sentencing prisoners convicted of such a crime to penal servitude, to order the prisoner to be once, twice, or thrice privately whipped. This provision acted like magic; no sooner did the jails resound with the yells of cowardly ruffians than pedestrians were

enabled to go about the streets with perfect safety, and although an isolated case of garroting may now and then occur, it is practically stamped out. The Act above referred to extended to England and Ireland, but Scotland was excluded from its effect. Why this should have been so we have never been able to understand. If it prevented crime in England, it would surely have had the same effect in Scotland; and the Legislature might have had sufficient confidence in the Scottish judges to feel certain that the power would not have been abused. The time seems now to have arrived when the state of crime in Scotland seems imperatively to demand the introduction of some such measure for that country. We would earnestly direct the attention of the Lord Advocate and the authorities to this matter. Surely we are not to be left in greater danger of our lives and property than are our Southern fellow-countrymen; if the law has worked well in England, there seems to be no reason why it should not work equally well here—"what is sauce for the goose is sauce for the gander." Meanwhile we hope that something will be done towards the reorganization of a police force in which there is much room for improvement, and the prevention of such crimes as have lately startled the peace-loving public.

Criminal Law Evidence Amendment Bill.—Mr. Ashley's Bill on the above subject was read a second time in the House of Commons on the 30th of January. Although the Bill does not apply to Scotland, it nevertheless threatens to introduce such an entirely new feature into criminal procedure in England that it may not be out of place to give an outline of its chief provisions. The main object of it is to allow accused persons to give evidence on their own behalf: a prisoner also may call his wife or her husband as a witness; and when there are two or more prisoners, they, their wives and husbands, may be called as witnesses for each other, unless they object. The evidence is to be taken on oath, and the prisoner is to be subject to cross-examination; he cannot refuse to answer any question bearing on the matter for which he is accused, even though it may tend to criminate him: but previous convictions and character are not to be made subjects of examination unless the prisoner has himself given evidence as to the latter. Statements of prisoners before justices may also be made on oath; and the 10th clause contains the extraordinary assertion, that no presumption against the prisoner is to be raised by his refusing to give evidence, and no reference is to be made to the fact of such refusal during the trial.

Such are the general principles of this Bill, which is, to say the least, extremely crude. In its present form it is not likely to pass, but the probability is that the whole subject will be referred to a select committee, and so will be lost sight of for some time. At present the Bill bristles with incomplete and impossible suggestions: if a prisoner were allowed to give evidence in his own be-

half, it might, as the Attorney-General admitted when opposing the second reading, procure a greater number of convictions than are got at present, but it would unavoidably let in a flood of perjury and hold out a premium to clever liars. In many cases it would be a very cruel trial to a wife to be called to give evidence in favour of a husband, which she could not conscientiously do but with the knowledge that if she failed to do so the retribution which awaited her from the hands of her husband would be heavy indeed. But indeed there are so many objections to the Bill in its present state that it is needless to enumerate them; they must occur to the mind of every practical lawyer that considers the matter. Meanwhile there is no chance of its becoming law, and much more serious and earnest consideration would require to be given to the subject than it has apparently received at the hands of the framers of the Bill.

Spring Vacation.—The Court of Session will rise for the usual spring vacation on the 20th inst. The Circuit arrangements are not yet made, and will not probably be announced until within a few days of the rising of the Court. We may take this opportunity of pointing out the inconvenience of this practice to the members of the Bar, and would respectfully suggest to the learned Judges the expediency of publishing the Circuit fixtures at an earlier period than is at present usually done.

THE following passage of words once took place between Lord Justice James when he was a Vice-Chancellor and Mr. Karslake, Q.C. The Vice-Chancellor observed to Mr. Karslake, "You have told me *that* three times before. My custom is this: When a thing is told me once, I make a mental note of it; when it is told me twice, I begin to forget it; and when it is told me a third time, my mind becomes a perfect blank on the subject." "Your honour," replied Mr. Karslake, "I am obliged to you for the information. I will now tell it to your honour for the *fourth* time, in order that it may come on the perfect blank, and be made a mental note of as for the first time."

THE BACHELOR'S DREAM.

[The following verses were found in the Editor's Box at the Parliament House. They seem to be the result of a nocturnal visitation which had disturbed the repose of some contributor to the Advocates' Widows' Fund, who had imprudently retired to rest, after endeavouring to master the contents of the Actuaries' Report, some time previous to the meeting of the 20th ult.]

A' NICH'T I'm haunted by a shape
 In weeds o' dool and bran-new crape,
 A fillet reid o' office-tape
 Medusan locks in 'mid o'.

I ken her weel, although she haud
 Her ill-faured face intil her maud;
 It's that—it's that contingent jaud,
 My widow!

Ilk towmont in the month o' June
 I get Hall-marked like ony spune,
 And five gude puns, a croon abune,
 I bude to mak' me rid o'.
 That's a' for her; sae though I crane
 Roond by her haffits a' in vain,
 It's her, or I am sair mista'en,
 My widow!

"I'm tell't," wi' gruesome tane quo' she,
 "Twa coontin' chiels, a Committée,
 And aiblins mair, wi' thocht o' me
 Are unco mystified, O!
 Lat them colloque, be't wrang or richt,
 But min', my jo, I rede ye ticht,
 Ye'll rue the day ye daured to slicht
 Your widow!

"Says ane, 'I' fegs, I'll pay nae mair
 The pickle gowd I ill can spare
 For hags that leeve far yont their share,
 Like them afore the Flude, O!
 Gudeman, the chiel his wits has tint;
 I daur ye to sae much as mint,
 For twa three motion-fees, to stint
 Your widow!

"Anither says, 'The bits o' weans,
 No auld eneuch to fend their lanes,
 They maun ha'e duds to cuire their banes
 And warm their orphan blude, O!
 Na, na, let Heriot's cleed the brats,
 And stairve or kill them wi' the bats,
 There's ane comes *primo loco*, that's
 Your widow!

"I'll marry ye, to please mysell;
 I'll gie ye some sma' taste o' ——;
 And syne I'll kist ye in your shell,
 And blithely steek the lid, O!
 Than gin ye le'e me bune the grund
 Wi' nocht o' tocher but the Fund,
 Wha'll pree, wi' sax-and-saxty pund,
 Your widow?"

Sae ilka nicht she'll crack and glowre
 Frae midnight to the chap o' foure;
 I sweat and swarf, and ower and ower
 I wuss her at Megiddo.
 I'm dwinin' fast, I'm weelnigh spent;
 I'll vote to raise the Annual Rent,
 I'll vote for aucht that will content
 My widow!

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF LANARKSHIRE (GLASGOW).

Sheriff GUTHRIE.

INSPECTOR OF POOR OF PARISH OF DENNY v. INSPECTOR OF POOR OF PARISH OF GOVAN.

Relief—Parish of Settlement—Poor Law Act, sec. 71.—In October 1874, Alexander Duncan, an able-bodied man, a widower, and in a position to maintain his family, arranged to board his infant child with a man called Duff, residing in Denny parish, Duncan agreeing to pay a sum of 5s. per week of aliment. Duncan was then working in Glasgow, and he paid several sums, but at intervals and very irregularly. About the month of March 1875 he fell into considerable arrears, and Duff threatened to send back the child. The letter to that effect, posted to Duncan's last address, was returned through the Dead-Letter Office, and no further attempt was then made to find his whereabouts. Duff then applied to the parish of Denny for relief, and obtained 4s. per week. Denny parish then gave notice to Govan Parish, the latter being the last residential settlement of Duncan. Within a few weeks of relief being given, Duncan's address was found by Duff, who wrote the former to come and see him. Duncan came, and also called on the inspector of Denny, and arranged with the latter to pay up by instalments the arrears due to Duff and the advances of the board, and he then made a payment to the inspector to account. Duncan paid no more, and was not further heard of till the death of the child in November 1875, when he appeared and buried it. In these circumstances Denny parish claimed from and sued Govan parish for the advances made. The Govan inspector pled (1) that the child was not a proper object of relief, and (2) that Denny parish should have proceeded against the father, who was able and bound to keep his child, and at all events that the inspector of Denny ought to have handed the child to the father in June 1875, when the arrangement was made by the latter with the inspector of Denny. Proof was led before Sheriff Guthrie, from whose interlocutor the following is an extract:—

“It is proved that the child was really deserted by the father, and it seems to be clear that in the circumstances the parish of settlement would have relieved the child, and would have been bound to do so. The parish of Denny acted virtually on behalf of the parish of settlement, and is entitled, under section 71 of the Act, to operate its relief, either against the parish to which the child belongs, or against Duncan, the father. It chooses to sue Govan, the parish of settlement, and the only question seems to be, whether, by its conduct in dealing with the child and with Duncan, it has forfeited its right to recover its advances. The most important matter in this case is, that the father was discovered some time after the child became

chargeable, that he actually came to the inspector at Denny, paid him 5s., and agreed to pay as much a week towards repayment of the arrears, and to keep up his payments for aliment. He was working as a moulder in a neighbouring parish, but a week or two after he disappeared, and has since been heard of only as having stayed one night with his parents, who live at Camelon, about five miles from Denny. It is said that at this meeting the inspector of Denny ought to have got the child handed over to the father, and that by not doing so, and by not taking more active measures to find out Duncan, it failed in its duty and is barred from recovering. I cannot appreciate the force of this reasoning. Denny could not receive from Govan the expenses of prosecuting Duncan (*Shannon v. Austin*, 30th October 1874, 2 *Rettie* 68), nor probably those of prosecuting further inquiries after Duncan. There had been notice given to Govan six weeks before this, and it is said that a correspondence was going on about the case. It might have been made a point, but it was not, that Denny failed to give any intimation to Govan of the meeting with Duncan in June and the arrangement then made. I do not know whether such notice was given or not; perhaps, as liability was not admitted, there may have been some excuse for not making intimation. Apart from this question, I do not see any such default on the part of Denny as to deprive the parish of its statutory claim against the parish of settlement. I am not satisfied that if Govan had been dealing directly with the child's father it would not have made some similar arrangement for the repayment of its advances and the support of the child, as being the best that could be done in the circumstances. The sum claimed is possibly more than the child could have been kept for, but it is less than the father contracted to pay, and there is no evidence to show at what rate other parishes can board pauper children. I therefore give decree for the sum actually advanced."

Act.—Donaldson.—Alt.—Wallace.

SHERIFF COURT OF CAITHNESS.

HARROLD v. MILLER, JUN.

Cessio, where a list of all creditors known to the petitioner was not given in the petition in terms of 6 and 7 Wm. IV. c. 3, sec. 3, and this appears from his state of affairs, petition dismissed.—Provisions of sec. 8 of Act of Sederunt as to intimation of new held inapplicable.—A petition for *cessio bonorum* was on 11th July last presented by Donald Miller, jun., and on 17th July he obtained interim liberation on caution. The only creditor mentioned in the petition entered appearance and opposed on various grounds, but not on the ground on which she succeeded in an appeal taken by her against the Sheriff-Substitute's interlocutor of 19th October 1877, which granted the benefit of *cessio*. The Sheriff's interlocutor and note furnish all the other necessary details:—

"*Wick, 9th November 1877.*—The Sheriff, having considered the objecting creditor's appeal, with reclaiming petition and answers, and whole process, sustains said appeal, recalls the interlocutors pronounced in the cause since 14th August 1877, when the state of affairs was lodged: Finds that said state discloses the fact that the petitioner, at the date of presenting his petition, had, and knew that he had, other creditors than the one set out in the petition: Finds that these other creditors should have been specified in said petition in terms of the 3rd section of 6 and 7 Wm. IV. c. 3, and therefore dismisses said petition, and decerns: Finds Catherine Harrold entitled to her expenses up to 14th August 1877, and *quoad ultra* finds no expenses due to or by either party.
Geo. H. THOMS.

"*Note.*—The appellant seeks to have the petition dismissed because of the omission from the petition of the creditors condescended on by the petitioner in his state of affairs, and who he must have known were his creditors at the time

of presenting his petition. There is no doubt that this is a statutory requisite (6 and 7 Wm. IV. c. 3, sec. 3); but it is said that section 8 of the Act of Sederunt of 4th June 1839 has so modified, in fact repealed, the enactment, that the Sheriff may, if he does not dismiss the petition, authorize the omitted creditors to be called by a special interlocutor which is not subject to appeal. This is a very strong contention, and the Sheriff prefers to adopt a construction of the Act of Sederunt which reconciles it with the statute. The sole case provided for by section 8 of the Act of Sederunt is that of an objecting creditor giving in a signed list specifying the creditors *whom he alleges* to have been omitted. The case here is different, inasmuch as the petition mentions only one creditor, Catherine Harrold, and it is from the petitioner's state of affairs (most unsatisfactory in every other respect) that it is learned that he had, and has, more creditors in (1) Jane Nicolson, the mother of another illegitimate child of his; (2) his father; and (3) his law agent, Mr. John M. Sutherland. The petitioner must have been all along in the knowledge of these creditors, and is, therefore, without excuse in disregarding the statutory condition on which he was entitled to apply for *cessio*, namely, the specification in his petition 'of *all* his creditors.' The proceedings here in consequence were *funditus* null and void, and the petition has been dismissed. Even in the case where it was the objecting creditor who alleged that a creditor was omitted, and that fact was admitted, the Sheriff, in adopting the alternative of dismissal allowed by the 8th section of the Act of Sederunt, was supported by the Court of Session (*Fraser*, 30th June 1837, 15 S. 1244).

"As, however, the objection to which effect is now given was equally open to the objecting creditor when the petitioner's state of affairs was lodged, and should have been then stated by her, expenses have not been given to her since the date of lodging that state. G. H. T."

Act.—G. M. Sutherland.—Alt.—J. M. Sutherland.

SHERIFF COURT OF ORKNEY.

COUNT AND RECKONING—GRAY v. GRAY'S EXECUTOR.

Should a count and reckoning by a next of kin where imperfectly laid be dismissed, or the necessary amendments allowed on adjustments?—In special circumstances the amendments allowed.

"*Kirkwall*, 13th November 1877.—The Sheriff-Substitute having considered the motion for revival refuses the same; and, in respect that the pursuer has set forth no sufficient title to sue, dismisses the action, and finds the pursuer liable to the defender in the expenses of process, of which allows an account to be given in, and when lodged remits the same to the auditor to tax and report.

JOHN C. MELLIS.

"*Notes*.—The pursuer in this case has not set forth in his designation that he is next of kin to his brother James Gray, master mariner, although it is evident from the prayer of the petition that it is as such that he sues, his claim being for what 'shall be ascertained to be the share pertaining to him, the said William Gray, pursuer, of the estate and effects of the deceased James Gray, master mariner, . . . who was a full brother of the pursuer.' The mere want of the designated words 'next of kin' might, of course, have been supplied by way of amendment, but that would not have availed much, seeing that even as such next of kin he could have no title to sue for any share of the deceased's estate or effects. In order to give a next of kin title to sue, he must have been decerned executor-dative if he can show no title to the position of executor-nominate (*Malcolm v. Dick*, 8th November 1866, 5 Macpherson 18). No such title of executor is alleged in the petition, nor was the existence of such a title averred at the bar. J. C. M."

Both parties minuted their consent to the Sheriff on appeal disposing of the

case without ordering a reclaiming petition and answers or a hearing. On appeal the following interlocutor was pronounced :—

"Kirkwall, 26th November 1877.—The Sheriff, having considered the petitioner's appeal, adheres to the interlocutor submitted to review, in so far as regards the refusal of the motion for leave to revise, and to that extent dismisses the appeal. *Quoad ultra*, sustains the appeal and recalls the interlocutor submitted to review. Directs the case to be put by the Sheriff-Clerk to the roll for the first Court day occurring not less than four days after the date of this interlocutor, in order that the parties may then adjust their pleadings (upon these pleadings and not in separate papers), and the Sheriff-Substitute shall then close the record, and thereafter proceed with the case as accords. And finds the petitioner liable to the defender in the whole expenses of process hitherto incurred by her, including those of this appeal, with the exception of the preparation and lodging of her defences, as the same may be taxed. GEO. H. THOMS.

"Note.—The case of *Malcolm v. Dick*, to which the Sheriff-Substitute refers, was different from the present, inasmuch as the pursuer there maintained his action 'as executor of the said Robert Dick, or as otherwise representing him.' The Lord Justice-Clerk accordingly said : "We have nothing to determine except whether a party who sets out the title of executor as *his only title to sue* is entitled to sue a petitory action without producing a decree dative or some other title such as a nomination as executor. . . . I know of no authority, and I can see no principle for holding that a party can sue *in the character of executor* before obtaining any title as such.'

"A case much more like the present is *Larson v. Ogilvy*, 8th July 1834, 7 W. & S. 397, where a lady who was served as heiress of entail, and was the 'only child' of her father, was held (affirming the judgment of the Court of Session) to have a sufficient title to insist for payment of rent falling under the executory without making up a title.

"Here it is alleged that the pursuer's brother James died intestate, so that there can be no executor-nominate. Had this been followed up by a statement that he died unmarried, the way would have been cleared for the succession of the next of kin. The defences, however, assume with the petition that James did die unmarried, and no prejudice to the defender will therefore arise by the addition of this fact to the statement in the petition at adjustment of the record. This course seems to be the correct application of the principles enunciated in *Manson v. Dundas*, 13th December 1870, 9 Macp. 272, as adapted to the new Sheriff Court Act of 1876.

"On the assumption of this addition being made, the allegation that James was survived by two brothers and at least one sister, who are his next of kin, becomes relevant, and discloses a title in the pursuer as one of the next of kin as good as that sustained in *Larson v. Ogilvy*.

"The extent of the pursuer's interest as such next of kin is, however, left in some obscurity. James was survived by the pursuer and another brother Robert and a sister Ann. Another sister Barbara is also mentioned as dead, but it is not stated whether she predeceased James or not. Had it been said in the petition what the share of James's estate claimed by the petitioner was (whether one-third or one-fourth), it might have been gathered whether Barbara survived James or not. This information, and also whether Ann and Barbara both died unmarried, should be added to the statements in the petition at adjustment of the record.

"As it is only a share of James's estate which the pursuer claims as his brother and one of his next of kin, all legitimate interest of the defender will, it is thought, be secured by annexing the condition of confirmation before decree (see Lord Justice-Clerk's remarks in *Malcolm v. Dick*), and that will protect her against any double demand. This will fall to be attended to when the case is finally disposed of.

"As it is with hesitation that the Sheriff has not dismissed the petition as irrelevant, but allowed an opportunity to the petitioner of now adding such

necessary averments as are above pointed out, the petitioner has been found liable in the whole expenses hitherto incurred by the defender, with the exception of the preparation and lodging of her defences. It is to be hoped that this will lead to more care in the preparation of the initial writs of all actions in this Court.

G. H. T."

Act.—Cowper.—Alt.—Macrae.

SHERIFF COURT OF BANFFSHIRE.

Sheriff SCOTT MONCRIEFF.

SCHOOL BOARD OF FORGLEN v. DAVID SMITH.—26th Jan. 1878.

Education (Scotland) Act, 1872, sec. 70—Failure to discharge the duty of providing elementary education—Circumstances held sufficient to warrant a conviction.

In this case the Sheriff-Substitute delivered the following judgment:—

"This is a complaint at the instance of the School Board of Forglen against David Smith, farm-servant, residing at Silverstrip in that parish, and it charges him, under the Education Act of 1872, with the offence of 'grossly and without reasonable excuse' failing to provide elementary education for two of his children, girls, about the ages of eight and five years. The defence is somewhat peculiar, and, shortly stated, amounts to this, that no blame can be attached to the accused, inasmuch as he is willing to send, and has indeed sent, these children to the Forglen Public School, but they have been refused admittance. In order to understand the state of matters in Forglen, it is necessary to refer to one or two facts in connection with the history of the School Board since it was established in that parish. At the time when the Education Act came into operation, there were in the parish two schools—the old parochial school, attended by both boys and girls, and a female school maintained by Lady Abercromby of Forglen. The School Board agreed to take over this latter school, and the names of the schools were fixed, in September 1873, as the Forglen Public School and Forglen Female School. In October 1873 it was unanimously resolved by the Board, in the mean time, to confine the teaching in the public school to boys, and in what had been known as the female school to girls. Objections may be taken to the terms of the resolution, but there can be no doubt that it has been carried into effect. The school buildings have been altered upon the footing that the boys and girls were to be taught separately, and they have, in point of fact, been taught separately ever since—the boys by the old parochial master, and the girls by a female teacher. These schools are only a few hundred yards apart. The female school is about 1400 yards from the house of the accused; the public school is nearer. The distance certainly places no obstacle in the way of his children attending either. But unfortunately for some time back obstacles have been raised. The accused, since April 1876, has insisted upon his right to send his girls to the Forglen Public School, and there has been a warfare carried on between him and his wife on the one part, and the School Board on the other. Both parties seem to have applied to the Scotch Education Board for advice, and applied in vain. The children have been tendered at the public school, and refused admittance; their parents decline to send them to the female school, where they would be admitted; consequently they are at no school.

"Now a great deal has been said, in the able and ingenious argument submitted for the accused, about his right to insist upon his children being educated at the public school under a master, and the legality of the School Board's conduct in thus separating the sexes has been called in question. But in the view which I take of the case, I do not feel obliged to pronounce judgment upon the School Board, or decide the constitutional rights of the accused. It seems to me that I have just to determine whether or not he is grossly and without reasonable excuse failing to discharge the duty of providing elementary

education for his children—nothing more. Now, what do I find as clear facts in this case? I find that these children are not receiving the requisite education, while there is a school at a convenient distance, to which, if they were sent, they would receive it. And when I come to inquire why they are not sent, I find that it is because their parents are engaged in a dispute with the School Board of the parish. There is no physical difficulty in the way, as in the case of *Campbell v. Jameson*, 23rd Feb. 1877, 4 Rep. 17. Further, I find that this dispute is not a thing of yesterday, but that it has involved a serious loss of valuable time, during which these children's education might have been progressing. I come, therefore, to the conclusion that the accused is guilty of the offence libelled.

"It would have been different had this complaint been brought shortly after the accused first insisted upon his right to send the children to the boys' school. But a considerable period has elapsed, and the accused must have been aware, for some time back, that this dispute will not be easily or speedily settled in his favour. His conduct, therefore, in continuing to keep back his children from the means of education available to him, is inexcusable. Were excuses of this sort to be given effect to, it might prove difficult for a School Board to exercise its functions, for many objections might be taken to a school and to its teachers.

"But while I convict the accused, I do not, at the same time, consider this case one in which anything beyond a nominal penalty should be inflicted. I trust that now, without further delay, these little girls will be sent to school; and if the accused is anxious to preserve his rights and try the question raised on his behalf, let him send them under protest. I impose a fine of one shilling, without expenses.

Act.—Gordon, P.-F.—Alt.—Watt.

Notes of English, American, and Colonial Cases.

NEW YORK COURT OF APPEALS.—Nov. 13, 1877.

LIABILITIES OF CARRIERS OF ANIMALS.

Mynard v. Syracuse, Binghamton, and New York Railroad Co.—Plaintiff shipped animals by railroad under a contract whereby he agreed to release and discharge the railroad company "from all claims, demands, and liabilities of every kind whatsoever, for or on account of or connected with any damage or injury to or loss of said stock or any portion thereof from whatsoever cause arising." Held, that the contract did not release the company from liability for loss resulting from the negligence of its servants.

A carrier of animals is excused from liability for loss caused by the inherent tendencies or qualities of the animals, but beyond this the common-law liabilities exist against him the same as against the carrier of any other kind of property.

Appeal from a judgment of the General Term of the Supreme Court for the Third Department reversing a judgment of the County Court of Cortland. Enough facts appear in the opinion. The decision at the General Term is reported 7 Hun, 399.

CHURCH, Ch. J.—The parties stipulated that the animal was lost by reason of the negligence of some of the employés of the defendant without the fault of the plaintiff. The defence rested solely upon exemption from liability contained in the contract of shipment by which, for the consideration of a reduced rate, the plaintiff agreed to "release and discharge the said company from all claims, demands, and liabilities of every kind whatsoever for or on account of, or connected with any damage or injury to or the loss of said stock, or any portion thereof, from whatsoever cause arising."

The question depends upon the construction to be given to this contract whether the exemption "from whatever cause arising" should be taken to include a loss accruing by the negligence of the defendant or its servants. The language is general and broad. Taken literally it would include the loss in question, and it would also include a loss occurring from an intentional or wilful act on the part of servants. It is conceded that the latter is not included. We must look at the language in connection with the circumstances and determine what was intended, and whether the exemption claimed was within the contemplation of the parties.

The defendant was a common carrier, and as such was absolutely liable for the safe carriage and delivery of property intrusted to its care, except for loss or injury occasioned by the acts of God or public enemies. The obligations are imposed by law and not by contract. A common carrier is subject to two distinct classes of liabilities—one where he is liable as an insurer without fault on his part; the other, as an ordinary bailee for hire, when he is liable for default in not exercising proper care and diligence, or, in other words, for negligence. General words, *from whatever cause arising*, may well be satisfied by limiting them to such extraordinary liabilities as carriers are under without fault or negligence on their part.

When general words may operate without including the negligence of the carrier or his servants, it will not be presumed that it was intended to include it. Every presumption is against an intention to contract for immunity for not exercising ordinary diligence in the transaction of any business, and hence the general rule is that contracts will not be so construed unless expressed in unequivocal terms.

In *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. (U. S.) 344, a contract that the carriers are not responsible in any event for loss or damage, was held not intended to exonerate them from liability for want of ordinary care. Nelson, J., said: "The language is general and broad, and might very well comprehend every description of risk incident to the shipment. But we think it would be going further than the intent of the parties upon any fair and reasonable construction of the agreement were we to regard it as stipulating for wilful misconduct, gross negligence, or want of ordinary care, either in the seaworthiness of the vessel, her proper equipments and furniture, or in her management by the master and hands." This rule has been repeatedly followed in this State.

In *Alexander v. Greene*, 7 Hill, 533, the stipulation was to tow plaintiff's canal-boat from New York to Albany *at the risk* of the master or owners, and the Court of Errors reversed a judgment of the Supreme Court with but a single dissenting vote, and decided that the language did not include a loss occasioned by the negligence of the defendants or their servants. In one of several opinions delivered by members of the court, it was said in respect to the claim for immunity from negligence: "To maintain a proposition so extravagant as this would appear to be, the stipulation of the parties ought to be the most clear and explicit, showing that they comprehended in their arrangement the case that actually occurred."

Wells v. Steam Navigation Co., 8 N. Y. 375, expressly approved of the decision of *Alexander v. Greene*, and reiterated the same principle. Gardiner, J., in speaking of that case, said: "We held then if a party vested with a temporary control of another's property for a special purpose of this sort, would shield himself from responsibility on account of the gross neglect of himself or his servants, he must show his immunity on the face of his agreement; and that a stipulation so extraordinary, so contrary to usage and the general understanding of men of business, would not be implied from a general expression to which effect might otherwise be given."

So in *Steinweg v. Erie Ry. Co.*, 43 N. Y. 123, the contract released the carrier "from damage or loss to any article from or by fire or explosion of any kind," and this court held that the release did not include a loss by fire occasioned by the negligence of the defendant, and in *Magnin v. Dinmore*, 56 N. Y. 168,

still more recently decided by this court, the contract with the express company contained the stipulation, "and if the value of the property above described is not stated by the shipper, the holder thereof will not demand of the Adams' Express Company a sum exceeding fifty dollars for the loss or detention of, or damage to, the property aforesaid." It was held, reversing the judgment below, that the stipulation did not cover a loss occurring through negligence, Johnson, J., in the opinion, saying: "But the contract will not be deemed to except losses occasioned by the carrier's negligence unless that be expressly stipulated." In each of these cases the language of the contract was sufficiently broad to include losses occasioned by ordinary or gross negligence, but the doctrine is repeated that if the carrier asks for immunity for his wrongful acts it must be expressed, and that general words will not be deemed to have been intended to relieve him from the consequences of such acts.

These authorities are directly in point, and they accord with a wise public policy, by which courts should be guided in the construction of contracts designed to relieve common carriers from obligations to exercise care and diligence in the prosecution of their business which the law imposes upon ordinary bailees for hire engaged in private business. In the recent case of *Lockwood v. Railroad Co.*, 17 Wall. 357, the Supreme Court of the United States decided that a common carrier cannot lawfully stipulate for exemption from responsibility for the negligence of himself or his servants. If we felt at liberty to review the question, the reasoning of Justice Bradley in that case would be entitled to serious consideration, but the right thus to stipulate has been so repeatedly affirmed by this court that the question cannot with propriety be regarded as an open one in this State. 8 N. Y. 375; 11 id. 485; 24 id. 181-196; 25 id. 442; 42 id. 212; 49 id. 263; 51 id. 61. The remedy is with the Legislature, if remedy is needed. But upon the question involved here it is correctly stated in that case that "a review of the cases decided by the courts of New York shows that though they have carried the power of the common carrier to make special contracts to the extent of enabling him to exonerate himself from the effects of even gross negligence, yet that this effect has never been given to a contract general in its terms." Such has been the uniform course of decisions in this and most of the other States, and public policy demands that it should not be relaxed. It cannot be said that parties in making such contracts stand on equal terms. The shipper, in most cases, from motives of convenience, necessity, or apprehended injury, feels obliged to accept the terms proposed by the carrier, and practically the contract is made by one party only, and should, therefore, be construed most strongly against him, and especially should he not be relieved from the consequences of his own wrongful acts under general words or by implication.

There was a period when the courts of England were inclined to relax this rule, and this led to the adoption of an Act of Parliament on the subject, under which the courts have since acted. See 10 H. L. Cas. 473.

It is argued that the rule does not apply to the carriage of animals, that in respect to such property the common-law liabilities of common carriers do not attach, that the carrier is only liable for negligence, and hence, that the stipulation can apply to nothing else.

There might be some force in this point if the position, that carriers of animals are only liable for negligence or misconduct, is correct. But that position cannot be maintained. The liability of carriers of animals is modified only so far as the cause of damage, for which recompense is sought, is in consequence of the conduct or propensities of the animals undertaken to be carried. In other respects the common-law responsibilities of the carrier will attach. This was expressly held in *Clark v. Railroad Co.*, 14 N. Y. 573. Denio, J., said: "But the rule which would exempt the carrier altogether from accidents arising out of the peculiar character of the freight, irrespective of the question of negligence, would be equally unreasonable. It would relieve the carrier altogether from those necessary precautions which any person becoming the bailee, for hire, of animals is bound to exercise, and the owner, where he did not himself assume

the duty of seeing to them, would be wholly at the mercy of the carrier. The nature of the case does not call for any such relaxation of the rule, and considering the law of carriers to be established upon considerations of sound policy, we would not depart from it, except where the reason upon which it is based wholly fails, and then no further than the cause for the exemption requires.

The case of *Palmer v. Railway Co.*, 4 Mees. & Wels. 749, is cited, where the same principle is decided. Animals may die of fright, by refusing to eat, or break from their fastenings and kill themselves, although every proper precaution was used, but there may be many accidents producing loss or injury to animals which are not attributable to acts of God, and which were not caused by the peculiar character of the property. By the act of God is meant something which operates without any aid or interference from man. *Merritt v. Earle*, 29 N. Y. 115. In that case it was held that the carrier was liable for the value of a span of horses lost by the sinking of a steamboat, caused by coming in contact with the mast of a sloop which had been sunk in a squall two days before. The court decided that sinking the steamboat was not caused by the act of God, and that the sinking of the sloop, although by the act of God, was too remote, and many accidents might happen, producing loss to animals, for which the carrier would be liable, although no fault or negligence could be imputed, and in respect to such the common-law liability would attach. Angell on Carriers, 190, lays down the same rule. The same qualification of liability applies to all property.

The carrier is excused from liability for loss caused by inherent infirmity or tendency to decay.

It has been held that a carrier is not responsible for the evaporation of liquids, nor for the diminution of molasses, caused by the oozing through vent-holes necessary to prevent the bursting of the barrels (Angell on Carriers, § 211, and cases cited); and exemptions from liability for loss by inherent qualities of animals rests upon the same principle. Beyond this the common-law liabilities exist against the carrier of animals the same as the carrier of other property, and the clause in the contract can, therefore, operate in many cases where negligence cannot be imputed.

In Massachusetts, in *Smith v. Railroad Co.*, 12 Allen, 531, the court say: "The common-law liability of a carrier for the delivery of live animals is the same as that for the delivery of merchandise. Upon undertaking their transportation he assumes the obligation to deliver them safely against all contingencies, except such as would excuse the non-delivery of other property." The qualification above referred to excusing the carrier from liability for loss occasioned by the nature and character of the property is recognized. This qualification or exception, as before stated, is applicable to all property, and does not affect the common-law liabilities to any greater extent than in respect to other property, except that the instances may be more numerous where the carrier will be excused.

In Angell on Carriers, § 214, it is said: "Such a case would seem to be analogous to the case of loss of merchandise, owing to some inherent defect which caused the destruction of it while in transit."

As well might carriers be exempted from common-law liabilities for loss of inanimate property as for animals, if immunity from loss from inherent defects, or from the nature and character of the property, will produce that result.

The only authority seeming to favour the position of the respondent is the *Cragin Case*, 51 N. Y. 61. The loss of the hogs in that case was caused by heat, and the negligence attributed was in not cooling them off with water. We do not think, under the peculiar stipulation and the character of the property in that case, that it is in conflict with the views before expressed.

The judgment of the General Term must be reversed and that of the County Court affirmed.

All concur. Andrews, J., taking no part. Folger and Miller, JJ., absent.—*Albany Law Journal*.

CONTAGIOUS DISEASES (ANIMALS) ACT.—*Order of Council—Transit of animals—Vessel conveying sheep from Ireland—Jurisdiction of justices—Appeal.*—In a proceeding for a penalty under the Contagious Diseases (Animals) Act before the justices for the county of Pembroke, against the master of a vessel for having carried sheep on board such vessel without having the places used for such sheep divided into pens, as required by the Animals Order of 1875, it was proved that the vessel brought the sheep from Ireland to New Milford, in Milford Haven, which is in the body of the county of Pembroke, and that the vessel arrived there without having the places on board for the sheep divided as required by the said Order. On these facts the justices determined that they had no jurisdiction to convict the master:—*Held*, that the justices had jurisdiction as the offence continued, so as to be in Pembrokeshire within the jurisdiction of the justices, when the vessel arrived at New Milford with the sheep without pens, as required by the Order. *Held* also, that though section 108 of 32 & 33 Vict. c. 70, gives a power of appealing from the justices to the Quarter Sessions, it does not deprive a party of the right to have a case stated for the opinion of the Superior Court, under 20 & 21 Vict. c. 43. And *Held* further, that the justices having necessarily heard the case before they determined that they had no jurisdiction, the opinion of the Court was properly applied for on a case under 20 & 21 Vict. c. 43, instead of on an application for a mandamus to the justices to hear.—*Muir v. Hore*, 47 L. J. Rep. M. C. 17.

TELEGRAPH COMPANY.—*Duty to recipient of telegram—Negligence—Delivery of message to wrong person.*—Plaintiffs, merchants at Valparaiso, received through defendants a telegram purporting to come from London and addressed to them, ordering a large shipment of barley. No such message was ever in fact sent to plaintiffs. The misdelivery of the message was caused by the negligence of defendants, and occasioned heavy loss to plaintiffs, in consequence of a fall in the market-price of barley. In an action to recover the amount of this loss,—*Held* (affirming the decision below, 46 L. J. Rep. C. P. 197), that there was no duty owing by the defendants to the plaintiffs in the matter, either by contract or law, and therefore no action would lie.—*Dickson v. Reuter's Telegraph Co. (Lim.)* (App.), 47 L. J. Rep. C. P. 1.

CRIMINAL INFORMATION.—*Responsibility of proprietors of newspapers for libel inserted by editor without their knowledge.*—On the trial of a criminal information for libel it was proved on the part of defendants, proprietors of a newspaper, that they had appointed a competent editor to undertake the literary management of the paper, and that the article in question was inserted by him without their knowledge, and without any specific authority or consent of theirs; and it was sought upon such evidence to raise a defence under section 7 of Lord Campbell's Act (6 & 7 Vict. c. 96). The learned Judge having ruled that, upon proof of the general authority of the editor who had inserted the article, it was not open to defendants to claim the protection of the statute, and having thereupon directed a verdict of guilty,—*Held*, by Cockburn, L. C.-J., and Lush, J. (*dissentiens* Mellor, J.), that a new trial ought to be had on the ground that the section did apply to the case of a libel published by an editor having admittedly general authority, and that it was a question which ought to have been left to the jury whether within the words of exemption in that section the defendants were criminally responsible for his act.—*R. v. Holbrook*, 47 L. J. Rep. Q. B. 35.

REVENUE.—*Inhabited house duty—Income tax—"Occupier"—Police Superintendent.*—A superintendent of police who lives in a house adjoining the police station, which communicates with it by a door in the yard, the house being liable to be employed for such purposes of the police force as the chief constable may direct, and who is compelled to live there, but is subject to be removed from station to station at any time, is not liable to inhabited house duty or to income tax under schedule B, as occupier of such house.—*Bent v. Roberts*, 47 L. J. Rep. Ex. 112.

WILL.—Construction—Accidental omission supplied.—Testator directed his trustees to stand possessed of five equal seventh parts of the moneys arising from the sale and conversion of his real and personal estate upon trust to invest, and during the respective lives of his five daughters, Elizabeth, Sarah, Eliza, Mary, and Hannah, to pay the interest to his said daughters respectively for their separate use. He then directed his trustees from and after the death of Elizabeth to stand possessed of one-fifth of the trust securities upon trust for the children of Elizabeth, and from and after the death of Sarah as to another fifth upon trust for the children of Sarah; and from and after the death of Eliza as to another fifth upon trust for the children of Mary (thus omitting to provide for Eliza's children, and failing to dispose of Mary's fifth after her death); and from and after the death of Hannah as to another fifth upon trust for the children of Hannah. The will also contained a power to the trustees until "the part or share of the said trust moneys of the issue of and of my said daughters" should become payable, to apply the same in the maintenance of such issue:—*Held*, that a clause, similar in terms to the clauses giving interests to the children of Elizabeth, Sarah, Mary, and Hannah, respectively, but giving an interest in one-fifth of the trust securities to the children of Eliza and disposing of Mary's fifth after her death, must have been accidentally omitted, and that the will ought to be read and construed as if such a clause were contained in it.—*In re Redfern; Redfern v. Bryning*, 47 L. J. Rep. Ch. 17.

LETTERS OF CREDIT.—Bills of Exchange—Contract between giver of letter and purchaser of bills—Conditional contract to accept.—Letters of credit, containing a promise to accept bills, create a contract between the giver of the letters and the person who advances money on the faith of them only when such letters are intended to be shown to third persons for the purpose of obtaining advances, or where the giver of the letter has so conducted himself that such an intention may fairly be presumed.—*Union Bank of Canada v. Cole* (App.), 47 L. J. Rep. C. P. 100. Documents in the form of letters of credit were addressed by the defendants to S. & Co., corn merchants, authorizing them to draw bills on the defendants against shipments of grain. To the documents certain conditions were appended. S. & Co. drew bills upon the defendants under the credit so opened without performing the conditions. The plaintiffs, having notice of the conditions, and knowing that they were unfulfilled, advanced money on the bills so drawn, which the defendants refused to accept. In an action against the defendants for not accepting the bills,—*Held*, that if the documents created a contract between the plaintiffs and defendants, that contract was subject to such of the conditions as were not necessarily subsequent to the advance.—*Ibid*.

SHIPPING.—General average—Part of vessel cut away to save whole adventure—Sacrifice of mere wreck.—A ship being caught in a storm portions of the rigging gave way to such an extent that the main-mast began to lurch violently, whereupon, fearing that the masts would rip up the decks and thereby endanger the safety of the ship, the captain ordered it to be cut away, which was done. In an action by the owner of the ship to recover from the owners of the cargo their proportion of general average loss incurred by the sacrifice of the mast, the judge left to the jury the following questions: first, Are you of opinion that the mast was virtually a wreck and gone at the time it went over? secondly, Do you find it was hopelessly lost? The jury answered both questions in the affirmative:—*Held*, by the Court of Appeal, reversing the decision of the Common Pleas Division, that there had been no misdirection, and that substantially the right questions had been left to the jury.—*Shepherd v. Kottgen* (App.), 47 L. J. Rep. C. P. 67. If anything on board a ship, which is cut or cast away because it is endangering the whole adventure, is in such a state or condition that it must itself certainly be lost, although the rest of the adventure should be saved without the cutting or casting away, then the destruction of the thing gives no claim for general average.—*Ibid*.

CHARITABLE LEGACY.—*First object illegal—Second legal—whole fund applied for legal object.*—Where the surplus of a fund, after providing for an illegal purpose, is given for a legal purpose, the whole fund is treated as surplus, and is applicable for the legal purpose.—*In re Williams*, 47 L. J. Rep. Ch. 92. A., by will, gave a fund upon trust to apply the income in keeping in repair certain tombs, and directed the surplus income to be accumulated till it amounted to £25 and upwards, when such a sum of money as would reduce the accumulations to £20 should be paid over in equal shares to the incumbents for the time being of two parishes for the benefit of three poor sick and infirm people:—*Held*, that the invalidity of the trust for the repair of the tombs did not defeat the gift to the incumbents, but that the whole fund must be treated as surplus applicable for the good charitable purpose, and must accordingly be given to the two incumbents.—*Ibid*.

PARLIAMENT.—*County vote—List of voters—Name on wrong list—Amendment.*—The appellant was duly qualified to vote for the county as occupier of a house and land rated at £12 and upwards. The appellant's name, which should have appeared on the list of voters entitled "as occupiers of the rateable value of £12 and under £50 rental," by mistake appeared on the list of voters entitled "in respect of property, including occupiers at a rent of £50 and upwards." Opposite to his name in the third column of this list, under the heading "nature of qualification," was inserted "occupier of a house and land rated at £12 and upwards." On objection to the vote,—*Held*, that under the powers of amendment granted by 6 Vict. c. 18, s. 46, the Revising Barrister had power to transfer the appellant's name to the proper list.—*Ballard v. Robins*, 47 L. J. Rep. C. P. 50.

PARLIAMENT.—*County vote—Disqualification of voter—Bribery—Report of election Judge.*—By the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), section 11, sub-section 14, the Judge who has tried an election petition in which a charge is made of any corrupt practice at the election, is to report to the Speaker *inter alia* "whether any corrupt practice has been proved to have been committed by or with the knowledge and consent of any candidate at such election, and the nature of such corrupt practice;" and by section 43 of such Act it is enacted that "where it is found by the report of the Judge upon an election petition under the Act that bribery has been committed by or with the knowledge and consent of any candidate at an election, such candidate shall be deemed to have been personally guilty of bribery at such election," and shall, amongst other things, be incapable of being registered as a voter during seven years next after being so found guilty. An election Judge appointed to try a petition against the election and return of A. G. as a member to serve in Parliament for the borough of K., reported, in compliance with the directions of the Parliamentary Elections Act, 1868, that it "was proved before him that the said A. G. was guilty of a corrupt practice at the said election within the true intent and meaning of the Corrupt Practices Prevention Act, 1854, and he further reported that the nature of such corrupt practice was the promising before and at the time of the said election to certain voters for the said borough of K. and other inhabitants thereof that the said A. G. would, in the event of his being returned at the said election, and after such return, give to such voters and other voters and inhabitants of K. an entertainment consisting, among other things, of meat and drink, with the view and intent to induce such voters to vote for him, the said A. G., at such election:—"—*Held*, that, even if the promising to give an entertainment to voters under the circumstances stated in such report amounted to bribery, it was not found by such report, either in express words or by necessary inference, that bribery had been committed by or with the knowledge and consent of the said A. G. at the said election, and that therefore the said A. G. was not disqualified by the said 43rd section of the Parliamentary Elections Act, 1868, from being registered as a county voter.—*Grant v. the Overseers of Pagham*, 47 L. J. Rep. C. P. 59.

THE JOURNAL OF JURISPRUDENCE.

THE SCIENCE AND ART OF JURISPRUDENCE.—II.

(Concluded from page 10.)

IN our last article on this subject we saw that positive laws are the result of jurisprudence as an art. When we speak of the law of England, the law of Scotland, or the law of Rome, we mean sometimes the sum of the positive laws in force in these respective countries, and sometimes the "art of jurisprudence," as it is practised in England, in Scotland, or in ancient Rome.

It is sometimes assumed that there is a science of positive law. Professor Lorimer takes this view, and draws the following distinction between the art and the science: "The science of positive law has for its object the discovery of the law of nature, in special circumstances, and with reference to special relations. The art of positive law has for its object the realization of the law of nature by special enactments, and its vindication in special circumstances and relations."¹

But, according to the Professor himself, a positive law is a natural law in certain circumstances, and at a particular place and time. The science of positive law has therefore for its object the discovery of positive laws; and this is just his definition of the art put in different words. All legislation, whether by a proper legislative body or interpretation by a judicial body, is merely the *discovery* and application of natural laws in certain circumstances. The form of words in which the enactment or decree is expressed may be different, according to the persons who pass the law or pronounce the decree, but the object and effect will be the same.

The distinction drawn by Professor Lorimer is rather a distinction between the *theory* and *practice* of law, both being parts of the

¹ Institutes of Law, Introduction, pp. 5, 6.

art. Professor G. J. Bell points this out in the introduction to his "Principles," when he says (p. 1), "The civil jurisprudence of Scotland comprehends, first, a knowledge of the *rules and exceptions* relative to civil rights, with the grounds on which they rest; and, secondly, the applications of those rules and exceptions to judicial determinations for the protection or enforcement of right." A theory is, if not absolutely essential, at least very useful in facilitating the practice of an art. A systematic theory enables a novice to acquire skill with greater rapidity; and it shows what progress has already been made in the art, so that discoverers and inventors may direct their energies to fields which are new and unexplored.

In Jurisprudence, as in all other sciences, the practice of the art is first developed. Then comes the theory, and then the science. Great legislators and lawyers often followed and obeyed great principles of which they were utterly unconscious.¹ The Greek philosophers no doubt have laid the foundation on which the modern *science* of jurisprudence has been raised, but with them the art was in too low a condition to lead them to a sound science. The ideal states of the Greeks remind us of Egyptian statues and pictures of the human form; or the maps which were produced in times when a survey of the country portrayed was thought an unnecessary preliminary. If the Greeks had followed the maxim, "Know thyself," in its true spirit, in politics and jurisprudence, they would have arrived at very different results both in their theories and their practice. Amongst the Romans the art arrived at very great perfection; but they were of too practical a disposition to create a metaphysic of law. Ulpian, indeed, had generalized all law into three maxims, but still he only treated it as an art, and he only aimed at the perfection of the theory. The science of law is essentially modern, and it may be said to date from the time of Grotius. It was the result of the attempt to systematize what had been till then, and perhaps still is, the somewhat doubtful art of diplomacy. The great constitutional questions which arose at the end of last century, many of which are still in process of being solved, naturally attracted attention to this subject, and gave an immense impetus to the study of abstract jurisprudence.

The history of the art of law is a most interesting study, and has been very satisfactorily treated by Sir Henry Sumner Maine, and other English writers. We may be allowed here to remark, in passing, that it has been observed that laws of procedure bulk largely and take a prominent position in ancient codes. For example, the Twelve Tables, so far as we have been able to reconstruct them, are, in their arrangement, exactly the reverse of "Justinian's Institutes." Laws of procedure in the former are placed first, and in the latter they hold the last place. The order of development of the art is probably the following: (1) Laws of execution; (2) Laws of judicial procedure; and (3) Laws

¹ Duke of Argyll's Reign of Law. Law in Politics—Example of Factory Acts.

applicable to the subjects of dispute. The old *legis actiones*, as described by Gaius, point to the conclusion that laws of execution preceded laws of judicial procedure in point of time. The *legis actiones* partake more of the nature of a Scotch "suspension" of diligence or execution on a bond or bill of exchange than of a regular action. The debt is clearly due—liquid. There is, at least at the very earliest stages, never any dispute between the parties. The pursuer is always right; the defender is always wrong. The pursuer does not ask an investigation into a doubtful claim, but his request is, "Avenge me of mine adversary." These ideas have left clear traces on our modern laws of procedure.

In England, at the present day, the art, both in theory and in practice, has been very voluminously treated; and, as above remarked, the history of the art has also been treated with great success by Maine and others. But, judging from the literature which is current in England at the present moment, the philosophy of law is a subject unknown there. Austin's great work is, for the most part, an elaborate attempt to vindicate an arbitrary and insufficient definition of law. When he deals with the groundwork of his subject, he rises no higher than "utility"—a principle which may explain the reason of the art, or, to put it more accurately, the immediate cause of its discovery, but has nothing whatever to do with the *science*. "Necessity is the mother of invention." But what physicist would accept the idea of necessity as an explanation of any mechanical contrivance? And yet it explains the steam-engine just as well as "utility" explains the origin of law and government. But although Austin thus gives us the stone of utility for the bread of philosophy, the portion of his work which deals with English and Roman law is nevertheless valuable. It treats of law, however, not as a science, but as a practical art.

Another work, which is a more glaring proof that scientific jurisprudence does not flourish in England, is Dr. Herbert Brown's "Philosophy of Law." We doubt if a book ever bore a more deceptive title. No one who had studied jurisprudence on the Continent, or even in Scotland, could guess the nature of the contents from the name of the book.¹ It is a short outline of the law of contracts, torts, and crimes, as practised in England. The book is a most excellent one, and no better introduction to English law could be put into the hands of a student. But it deals with the art, not with the science, of jurisprudence. It gives precisely the information we get in Blackstone, or in works such as Addison on Contracts and Torts. It may be thought that these remarks are the result of prejudice; but, so far from this being the case, it is well known that Englishmen themselves have recently been awakened to their deficiencies in this respect. Three years ago, in a lecture,

¹ The excuse for the use of the word "philosophy" in this sense will be found in the phrases "Philosophical Society," "philosophical instruments," "natural philosophy," etc.

a portion of which appeared in these pages,¹ Professor Amos remarked that English students had, up to very recent times, been studying jurisprudence only as an art and not as a science. But even Professor Amos himself seems unable to free himself from the chains in which he has been educated, and which he sometimes feels so galling. In the very lecture referred to, he speaks of Bentham and Austin as having devoted themselves to the study of law as a science. Now, if there was anything which would have made either of these eminent men indignant, it would have been a suggestion that they were acquiring and communicating knowledge which would not be of *practical* benefit to their fellow-men, but which was intended, primarily at least, to gratify a curiosity which they would have termed idle. With the science in this sense they had no sympathy whatever. They dealt with the theory of law, and intended their efforts to assist the work of practical lawyers, legislators, judges, pleaders, and conveyancers.

In Professor Amos's work on Jurisprudence,² he starts by *assuming* a civil government as necessary for law, and he practically adopts Austin's definition of law. But this is a clear *petitio principii*, for the whole object of the science is to ascertain if government is essential to law, or if law is deeper, and is in reality the creator of government. In a treatise on the *art* it may be quite proper to tell the reader that what is understood by practical lawyers as "law" is "a body of commands formally published by a sovereign political authority,"³ although this statement is too sweeping, and is, as Professor Amos himself shows, misleading and inaccurate.⁴ This is in substance the information given to every student who begins to study law practically. He is told that the law is laid down in Acts of Parliament, or is recognised in decisions of the superior courts. He is told that private opinions and unauthorized text-books do not make law; but only the Legislature or any authority—such as the Court of Session in Scotland, or the Lord Chancellor and a Committee of Judges—to which Parliament sometimes commits legislative powers. The scientific jurist, on the other hand, accepts these phenomena, analyzes them, and tries to reduce them to a single principle—a unity. He goes further back than civil government and political superiors, and yet he finds law in some form or another. The science investigates the ultimate essence of law. Professor Amos, throughout the first chapter of the work referred to, treats the science as if its object were to assist the legislator, the judge, and the advocate, and despises "a frivolous spirit of historical curiosity or antiquarian research."⁵ But the Professor forgets that the aim of science is knowledge *for its own sake*. If his results aid any practical art,

¹ Vol. xix. (1875), p. 50.

² A Systematic View of the Science of Jurisprudence (Longmans), 1872.

³ Ibid. p. 1.

⁴ See pp. 3, 6, *et seq.*

⁵ P. 31.

the scientific investigator does not object to the practical artist taking advantage of them. But while the aim of Professor Amos's work is professedly practical, it is a great advance on Dr. Brown's conception of the subject. It is not confined so closely to English law, and it is really a treatise on the "art of jurisprudence" in the abstract. That he is dealing with the art and not with the science is shown by his remarks as to the progress of the science,¹ "in the sense that the facts with which it deals are constantly accumulating, as a more complicated social condition is being brought about." But it is the art which deals with the more complicated social conditions, and which is therefore, notwithstanding the opinions of Mr. Bright² and the projects of the codifiers, daily becoming more complex and more difficult to acquire. The science, on the other hand, tends to become more simple and more general. And so far from becoming more complex, in consequence of "complicated social conditions," the point at which the greatest difficulty is felt in the science is that at which a social condition can hardly be said to exist, and where we almost lose sight of the art. In fine, to use a logical illustration, the art becomes difficult and complex through the *extension* of the term "law," the science becomes difficult and complex through its *comprehension*.

Again (at pp. 38, 39), Professor Amos calls legislation and government *sciences*, although Plato and Aristotle had long before treated them as *arts*.³ He occasionally, however, gives expression to more just views, as when he speaks of law being "the formal and outward expression of the moral order demanded by the joint spontaneous sentiments of a people and its rulers;"⁴ or, again, when he says, "No one pretends to say nowadays that law in the shape of a body of commands, emanating from one class of persons, however powerful, and addressed to other classes, however weak, is the sole cause and creator of human society."⁵

Professor Amos's more recent treatise on the "Science of Law"⁶ is a much more satisfactory work. But a close inspection of it shews that, although it deals more with the science than his larger work, this really arises from the fact that it is a popular work, addressed to non-professional readers, and not to persons who practise the art of law. It however deals largely with legislation, which is one branch of the art of law. Throughout this work, as in his larger one, while he is perfectly aware of the nature and origin of law, he still retains Austin's definition, and so he is under the necessity of explaining it away in the course of his investigations. In short, Professor Amos's chief fault is his not breaking away completely from Austin.

¹ Pp. 9, 10.

² See report of his speech at Birmingham, November 1877.

³ See Grant's *Ethics of Aristotle* (2d edition), vol. i. p. 347.

⁴ P. 21.

⁵ P. 35.

⁶ No. X. of the International Scientific Series, published by Henry S. King & Co., London (3d Edition, 1877).

We have dwelt thus long on Professor Amos's works, because they mark a transition period in English scientific jurisprudence. Instead of Austin's absurd attacks on the "jargon" of the German jurists,¹ Amos says that "the prospects of the science of jurisprudence, especially in England, will depend largely upon a greater familiarity than has hitherto been encouraged in legal education with the vast and invaluable judicial literature of Germany and France."² When the new direction thus given to legal education has taken effect, and the generation which treated law and equity as different systems has passed away, we may expect a new era in English jurisprudence as a science.

The cause of this state of matters, which is so much deplored by Professor Amos, is explained by Mr. Markby in his "Elements of Law."³ He states that until recently the only means of obtaining a theoretical knowledge of law was by attendance in the chambers of a practising lawyer. It is only recently that a complete school of legal education was established in London, and its chief object is the communication of theoretical knowledge, which the practising lawyer may turn to account. Even in the Universities the practical spirit is paramount. Of this a good example is found in Dr. Whewell, who was an enthusiast in all branches of science properly so called. But when he turned his attention to jurisprudence, and wished to encourage the study of public law in the University of Cambridge, he endowed a lectureship for teaching the *art* of diplomacy instead of the science of public law.

On the Continent jurisprudence is regarded as a branch of philosophy,⁴ and from this point of view many of the greatest philosophers and jurists have developed the subject with substantial results. The contrast between the English and German mode of treating the subject is very well brought out by comparing the introduction to Poste's edition of Gaius with the introduction to Puchter's "Cursus der Institutionen." In the former we have a *resumé* of Austin's definitions and terminology, and in the latter we are plunged into metaphysics. To such an extent does a craving for a substantial foundation in facts exist in the English mind, that when the origin of property and law is discussed, many English writers have manufactured history, and have had recourse to a fictitious pre-historical natural state of society.

Professor Lorimer's "Institutes"⁵ is an example of a treatise on the science. But he perhaps goes too far in his anxiety to avoid what belongs to the art. At p. 424 *et seq.* of that work he explains his position, and why, like most Continental jurists,⁶ he does not proceed to a "special part" of the subject, where the

¹ Austin's Jurisprudence, vol. ii. p. 405.

² Jurisprudence, p. 505.

³ Elements of Law (Clarendon Press Series), Introduction, p. ix.

⁴ See Hegel, Philosophie des Rechts, Introduction, § 2.

⁵ Edinburgh (1872).

⁶ See Trendelenburg's Naturrecht, p. 192; and Ahrens, Cours de Droit, vol. ii.

separate legal relations (what our German friends call "*rechtsverhältnisse*") occurring in actual life are set forth and discussed. The reason he gives is that "we shall have an opportunity of discussing them in their proper places, sometimes as jurists in the narrower sense of that term, sometimes as politicians, and sometimes as political economists;" in other words, they belong to the art and not to the science. But while we must complain of English writers giving us nothing but the "special part," we cannot help complaining of its omission by Professor Lorimer. Dr. Hutchison Stirling, following the example of Continental jurists and philosophers, has shown in his lectures, already referred to, that the separate legal relations may all be treated analytically—that the laws of the person and family, property, contracts, delicts, crimes, can all be traced back to the essential nature of man as such. The danger, of course, is that the work may become one on comparative jurisprudence—a very useful and interesting subject, but not the philosophy of law, although some English writers use the terms as synonymous.

We may remark, in passing, that it is a noteworthy fact that the philosophy of law, in its proper sense, has flourished only in those countries which have borrowed their positive laws from the law of Rome. In Scotland the science has been more successfully cultivated than in England. This is, no doubt, due partly to the nature of Scotch law, partly to the national taste for metaphysics, and partly to our intercourse with the Continent. The chair of "Public Law and the Law of Nature and Nations," in the University of Edinburgh, would also contribute materially to the result. The very name of the chair would remind him who occupied it, and the students who listened to him, that they must be followers in the footsteps of Grotius and Puffendorff.¹

In closing this subject, we would refer shortly to two points connected with it; and, first, as to the *method of investigation* in the science of law. In Germany we find schools which are called philosophical, and others which are called historical. There is a strong tendency in modern philosophers to discard the inductive method as inapplicable to their subject. Professor Ferrier, speaking of the fundamental canon of the Baconian philosophy, says, "If it has acted like fanners upon the physical sciences, it has certainly fallen like an extinguisher on philosophy."² We fear Professor Ferrier has been led away by his horror of "Scotch philosophy." If the Scottish school has erred, it has been by *neglecting* nature and the Baconian precepts. Ferrier accuses the disciples of that school of ignoring the fact of consciousness. But who would think of condemning the Baconian philosophy because *one* set of astronomers had taken no notice of parallax and aberration? In jurisprudence there ought to be no antagonism between the *a priori* and

¹ Dalzel in his "History of the University of Edinburgh" (vol. ii.), tells us that Erskine, the first professor, frequently visited the Continent.

² Ferrier's Lectures and Philosophical Remains, vol. ii. p. 247.

the historical school. They are really both doing work which is often combined in the case of the physical inquirer.¹ The latter makes a number of observations or experiments, and then he devises or guesses a law which combines them into a unity. Or, again, the observations may extend over years or centuries, until some one discovers the law which binds them together. A physical "law" is simply a theory—very often predicted from *a priori* reasoning before it is verified by experiment—which explains the phenomena of all the observed cases. No explanation of the facts of jurisprudence can be accepted which does not embrace *all* the facts disclosed by the history of law from the earliest times to the period of its highest development. In a word, the true philosophy of law is not a set of abstract theories, however complete and symmetrical, but it must rest on, and be capable of verification from, the facts of history.

Our second remark is as to the practical use of the science of jurisprudence as we have explained it in the foregoing pages. It was not our intention originally to say anything as to this, because knowledge, *for its own sake*, is a sufficient object, and an ample reward to the man of science; but as these pages may be read by some legal sceptic—for there are legal sceptics as well as theological and philosophical ones—a word or two may be necessary. No doubt to the ordinary practising lawyer, whether at the bar or on the bench, a knowledge of the science is not absolutely required; just as the master of a ship may be a first-class sailor without a profound knowledge of mathematics and astronomy—without, perhaps, ever having heard of De Moivre's theorem, or of the differential calculus—without being able to theorize as to what is on the other side of the moon—the nature and object of Saturn's rings—the nature of nebulae and double stars—the character of comets—the inhabitants of the planets—the geography of Mars—the meteorology of Jupiter,—being, in fact, ignorant of all the most *interesting* subjects of which astronomy treats; and just as a man may be an excellent mining engineer without being a professor of geology and palæontology. Even in the important work of legislation, as has been remarked before, correct philosophical principles have been unconsciously applied, when they forced themselves on the notice of the Legislature. But the application of those principles ought not to be left to chance. On the contrary, we do not hesitate to affirm that to the legislator and the jurist who deals with questions in constitutional and international law, a knowledge of the science is an *indispensable requisite*. Take, for example, the question of the Permissive Bill. It was lately said by an eminent prelate, who is opposed to the measure, that he would rather have Englishmen free and drunkards than make them sober by Act of Parliament. This sentiment has actually been repeated by members of Parliament

¹ Physicists sometimes get beyond induction. See *The Unseen Universe*, p. 186 *et passim*.

with approbation; and yet the fallacy is quite obvious to one who has any acquaintance with modern philosophical discussions on the subject of "Freedom." It does not require an overwhelming amount of common sense to perceive that a *slave to strong drink* can hardly be called *free* in any sense of the word!

Scotch readers hardly need to be reminded of the important part the word "Free" has played in Scotch ecclesiastical history. One of our Presbyterian dissenting bodies claims as part of its title the epithet "Free." There may have been at the Disruption, and there may be still, in that Church some enthusiasts who thought they could get into a region outside of law. But they have been shown practically to be mistaken. The freedom that Church enjoys is the freedom enjoyed by every British citizen. Again, on the other hand, we find some who ridicule the Free Church, and say its boasted freedom is a nonentity, because it may be called into a civil court of law. This is the other side of the same fallacy. Freedom consists not in immunity from law, but in spontaneous obedience to it. A British subject is free although he is not allowed by law to murder and steal. If any "Free" Church court committed a *malicious* act, it would cease *ipso facto* to be *free*, and the Civil Court would be called in to *restore*, not to *abridge*, its freedom.

But take another example of the necessity of examining closely the notions with which we deal—the notion of equality. It has been said that an immense amount of nonsense has been spoken on both sides of the question of Women's Rights. The one side maintains with great gravity that women are naturally equal with men. They might as well tell us that their average height and weight were the same. The other side tells us with equal gravity that politics and certain occupations are not "woman's sphere." This proposition is philosophically untenable, and is in process of being disproved by the facts of history. It is one of the last relics of caste. The same argument was used in America to defend negro slavery; and this notion is one of the greatest barriers to the progress of India. If the argument that women are precluded by their occupations from taking part in politics were pushed to a logical conclusion, the result would be a great restriction of the franchise as applicable to men. And as to occupations, no hard-and-fast line can be drawn, but every individual must find for himself or herself the sphere of life for which he or she is individually fitted.

From these two examples it will be seen that some of the burning questions of the day would have a great deal of light thrown on them by a serious study of scientific jurisprudence. Free Trade, the Law of Master and Servant, Disestablishment, and such questions, will never be satisfactorily solved by a struggle between the selfishness of those in possession of exclusive privileges and the selfishness of an excited mob clamouring for possession. There are some among us who can discuss those questions calmly and dispassionately, but their number might be greatly increased. We do

not suggest that every lawyer should forthwith undertake the study of abstract jurisprudence, but we maintain that a more general study of that subject would be an immense practical benefit to the community. Many ideas in philosophy and politics which a few centuries ago were paradoxes, have in course of time, by the gradual spread of education among the people and the influence of Christianity, become mere truisms. Every schoolboy accepts the Copernican theory of the solar system, and wonders how people could have thought otherwise, although he could not give any substantial reason for his opinion. The gradual popularization of ideas which once were the property of the few has often been remarked. Can nothing be done to accelerate this progress? False doctrine is as dangerous and pernicious in law as in theology, and the evident effects are more appalling to us. In these days, when our legislators feel it to be their duty to "give an account of their stewardship" to their constituencies, it is the duty of every wellwisher of the State to see that sound opinions on all questions of national and international polity are diffused among the masses. The upper classes have not the immense power of the polling-booth; but they have much greater power through the press, the platform, the pulpit, and the universities. The power may be in the hands of the rabble, but they are merely common soldiers. The upper classes are still the generals, and it will be their fault if they allow the government of this country to fall into the hands of an illiterate and undisciplined mob. Brute force is valuable only when properly directed—in proper channels and to proper objects. Both the exercise and the direction of this force are arts which may derive much valuable assistance from a sound and thorough knowledge of the science of jurisprudence.

W. G. M.

INTERNATIONAL JURISDICTION.

Few legal questions have been discussed of greater difficulty than those which relate to conflicting claims of sovereign jurisdictions. Under what circumstances am I, a Scotchman, entitled to summon a Frenchman to the courts of Scotland, and pursue a case to judgment? What effect will be given in the courts of France to a Scotch judgment so obtained? These may be said to be questions, in the first place, of Scotch and French law; but on such subjects the peculiarities of municipal have a constant tendency to merge in the higher unity of private international law. Of course, upon the principles of the latter, there may exist the widest differences of opinion in the municipal courts of different countries. But the subject is one to which attention is being paid in the new Codes of Europe. And where, as is the case with England, Scotland, and Ireland, three nationalities and two systems of law are subject to

the same sovereign power, there seems to be no reason why any conflict of jurisdiction may exist, for jurisdiction is or ought to be a matter of convenience not based on distinctive principles of common law. We propose to describe the claims of jurisdiction made by the courts of the three kingdoms respectively over persons resident beyond their jurisdiction proper, shall then compare them, and make a few suggestions for their equitable adjustment. And in the meantime, at least, we shall not deal with such special questions as are raised by Bankruptcy or the *Forum Cessionis*.

As regards the English courts this matter is now regulated by Order XI. scheduled to the Supreme Court of Judicature Act, 1875, 38 and 39 Vict. c. 77. The 1st rule of that Order permits the court or judge to make an order for service out of the jurisdiction whenever the whole or any part of the subject-matter of the action is land or stock, or other property situated within the jurisdiction, or any act, deed, will, or thing affecting such land, stock, or property; and whenever the contract which is sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in any such action, or for the breach whereof damages or other relief are or is demanded in such action, was made or entered into within the jurisdiction, and whenever there has been a breach within the jurisdiction of any contract wherever made, and whenever any act or thing sought to be restrained or removed, or for which damages are sought to be recovered, was or is to be done, or is situate within the jurisdiction. The rule, therefore, asserts jurisdiction for the English courts in four classes of cases: (1) Actions relating to property in England; (2) actions relating to contracts made in England; (3) actions relating to breaches in England of any contract whatever; (4) actions relating to acts done in England. In order to explain the existence of this rule, we must go back to the English Common Law Procedure Act, 1854, 15 and 16 Vict. c. 76, secs. 18 and 19, which provided that where a cause of action arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction, service might be made on any defendant, being a British subject, and residing beyond the jurisdiction of the court, in any place *except in Scotland or Ireland*. It was necessary to satisfy the judge that personal service had been made or attempted, and that the defendant wilfully neglected to appear or was living abroad to defeat his creditors. There was for several years a great dispute between the Courts of Queen's Bench and Common Pleas in England with respect to the construction of this Act and the extent of jurisdiction it conferred, in *Allhusen v. Malgarejo*, L. R. 3, Q. B. 340, the defendant, a foreigner residing in Spain, entered into a contract with the plaintiffs abroad to sell them a quantity of manganese, to be delivered at Newcastle, where the plaintiffs' place of business was. Only partial delivery having been made, Allhusen raised an action of damages in the

Queen's Bench, and issued a writ of service under the Common Law Procedure Act, 1854. But Blackburn, J., and the other judges refused to allow the action to proceed. They said that the whole cause of action must arise within the jurisdiction. "Laws of action," said J. Lush, "is a comprehensive term which includes every circumstance which goes to make up a contract and breach. If a foreigner comes here and makes a contract in this country, and there is a breach abroad, he can be sued here; but if a contract be made with a foreigner abroad, and the breach takes place here, he cannot be sued." The same judge pointed out the difference of language used in the Act 9 and 10 Vict. c. 95, sec. 128, which gives to superior courts concurrent jurisdiction with county courts "where the cause of action did not arise wholly or in some material point;" and Blackburn, J., said that under the old County Courts Acts it was always held necessary that all things which go to constitute the cause of action must occur within the jurisdiction. Reference was made to *Sichel v. Borch*, 3 H. and C. 865, where in an action against the drawer of a bill of exchange drawn in Norway, payable in London, it was held that the cause of action did not rise within the jurisdiction. In sharp conflict with the case of *Alhusen* is that of *Jackson v. Spittall*, L. R. 5, C. P. 542, in which four judges (Bovill, C. J., and Keating, Montague Smith, and Brett, JJ.) held that the expression "cause of action" in the 18th section of the Common Law Procedure Act did not mean the *whole* cause of action, viz. both contract and breach, but the act on the part of the defendant which gives the plaintiff his cause of complaint. Jackson sued Spittall, who was a British subject resident in the Isle of Man, upon an alleged breach of a contract not to indorse a bill of exchange delivered to him as a security. The contract was made in the Isle of Man, and the breach by indorsing over took place in Manchester. As Justice Brett, who delivered the judgment, observed, "The point is one of great importance. Besides its applications to shipping contracts made in all parts of the world, the daily increasing trade with the more adjacent countries of the Continent, in the course of which numerous orders are given abroad, either to firms wholly foreign or to British subjects resident and carrying on business abroad, but which orders are to be fulfilled in England, makes the question now before the Court one of the greatest mercantile interest." In order to decide the question, the learned judge accordingly inquires what was the state of the law relating to jurisdiction before the passing of the Common Law Procedure Act. "We apprehend that the superior courts of England did not decline jurisdiction in the case of any transitory cause of action, whether between British subjects or foreigners resident at home or abroad, or whether any or every fact necessary to be proved in order to establish either the plaintiff's or the defendant's case arose at home or abroad. Though every fact arose abroad, and the dispute was between foreigners, yet the courts

would clearly entertain and determine the cause, if in its nature transitory, and if the process of the court had been brought to bear against the defendant by service of a writ on him where present in England." And then he quotes Eyre, C.-J., to the effect that "if matters arising in a foreign country mix themselves with transactions arising here, or if they become incidents in an action the cause of which arises here, we have jurisdiction." This quotation is from the case of *Ilderton v. Ilderton* (2 H. Blackstone 145), which is well worth study by all who wish to understand the old English doctrine of *venue*, viz. that the jury of one place could not try a matter arising in another place, because originally jurors were selected on account of their supposed knowledge of the transaction. This gave place to the principle that the place laid in the declaration draws to it the trial of everything that is *transitory*; and, according to Chief-Justice Eyre in *Ilderton's* case, "all matters arising in a foreign country must be considered for the purpose of trial as transitory: there can be no reason for preventing the trial of them in one county rather than in another. When the old doctrine prevailed, if a matter arose in Ireland, the judges thought themselves obliged to take a jury *de vicineto* of the borders of the English county nearest to Ireland; but since that doctrine has been justly exploded, if a defendant were to plead a matter arising in a foreign country, he would be obliged to lay the same *venue* as was laid in the declaration." It was in conformity with this principle that where matters were alleged arising in a foreign country the fiction was used of their having arisen in the parish of St. Marylebone, in the Ward of Cheap. This, however, belongs to the antiquities of the subject. So does the process of outlawry, by which British subjects resident abroad were made amenable to the English courts in causes of action over which they had jurisdiction. That foreigners as well as subjects were reached by this principle is apparent from *Mathews v. Erbo* (1 Ld. Raym. 349), where "it was moved to set aside an execution on an outlawry against the defendant upon affidavit that he was an alien merchant, and lived beyond the sea, and was commorant there during all the time that the plaintiff proceeded to outlaw him. But it was denied by the whole Court, because by this means any person might contract debts, and then go beyond sea, and so he will be out of reach of the law." It will be kept in view that the usual modern definition of transitory actions is, "actions for breaches of contracts, personal wrongs, and injuries to personal property, which might, in the nature of things, have arisen anywhere." Returning from this antiquarian digression to *Jackson v. Spittall*, we observe that the judgment there is based nominally on the words of the Procedure Act, but really on the prior native jurisdiction of the court "on a writ of *distringas* for the purpose of compelling appearance, or for proceedings to outlawry."

The contradiction in the English courts of common law was kept

up in a spirited manner by the Court of Queen's Bench in *Cherry v. Thomson* (L. R. 7, Q. B. 573), where the plaintiff and defendant, both British subjects, being in Germany, there became engaged to marry each other. "It was," as Blackburn, J., observed, "intended that the marriage should take place in Germany, but no precise time was fixed for the performance of the contract. It was therefore in contemplation of law a contract to marry in a reasonable time." The plaintiff came to England for a temporary purpose, and there received a letter from the defendant declining to carry out the agreement. This, on the principles of the well-known case, *Frost v. Knight* (L. R. 7, Ex. 111), was held to be a breach of the contract, though a reasonable time had not elapsed. But the Court, consisting of Cockburn, C.-J., Blackburn, Lush, and Quain, JJ., held that the breach occurred in Germany, and that even if the receipt of the letter had been the breach itself, and not merely the evidence of it, yet it was necessary, under the Common Law Procedure Act, that the whole cause of action should occur in England, the statute distinguishing between actions *in delicto* and actions *in contractu*. With reference to the case of *Jackson*, the Court say: "The Court of Common Pleas are no doubt right in saying that, according to the decisions, the courts of this country have jurisdiction to try all transitory actions, wheresoever arising, if the defendant voluntarily appears in our courts, or comes within the jurisdiction, so as to be served with process within it. If a cause of action arose entirely abroad between two foreigners resident in their own country, and then the defendant came to England, the plaintiff might follow him and sue him here; and before the Common Law Procedure Act, if a foreigner had property here, he might perhaps by the process of distringas, and increasing the issues, have been compelled to consent to appear; and a British subject resident abroad might have been indirectly compelled to appear by outlawry. But the Legislature, in the Common Law Procedure Act, 1852, do not say that a writ of summons may be served and proceeded upon whenever the cause of action is one that might be sued upon in this country. And there was good reason why they should not say so; for they were giving powers to proceed not only against English subjects, whom our Legislature may bind as it pleases, but also against foreigners not resident in this country; and we cannot doubt that if our Legislature had enacted that a foreigner resident in his own country should be liable to be served with our process, so as, in case of his non-appearance to make a plaintiff to proceed to judgment for a cause of action arising in the country of the foreigner, the latter would be entitled to treat this as a usurpation, and his Government would have good ground for complaining of it. Nor has the Legislature made the right to compel an appearance to depend at all on the possession of property within the jurisdiction. The Legislature has carefully confined the power of compelling the appearance of the foreigner not

resident in this country to two cases. The one is where the cause of action arises in this country ; and if this means the whole cause of action, the foreigner has no just cause of complaint ; but if he were compelled to appear when only a part of the cause of action arises here, we think he would have just cause to complain. The other case is where the foreigner has, either in person or by his agent, made a contract in this country, in which case there is at least a plausible ground for saying that the foreigner who has made a contract in this country cannot complain if he is called upon to answer in the courts of this country for the breach of a contract made within it." This conflict of decisions, in which the Exchequer Court had also taken part (*Durham v. Spence*, L. R. 6 Ex. 46), was at last set at rest in *Vaughan v. Weldon* (L. R. 10 C. P. 47), where Lord Coleridge, after holding a conference of all the judges, announced that, although the Court of Queen's Bench remained of the opinion expressed in *Cherry v. Thomson*, they had agreed to acquiesce in the opinion of the majority of the judges, and that the rule of *Jackson v. Spittall* would therefore be followed for the future.

Such being the practice of the Common Law Courts down to 1875, let us see in what way the Court of Chancery in England had exercised its jurisdiction prior to the same date. This depended on the 33rd Order of 8th May 1845, and afterwards on the 10th of the Consolidated Orders, Rule 7, which confer on the Court a discretionary power of ordering service on a defendant in any suit who is out of the jurisdiction. For a long time it was supposed, on the authority of Lord Westbury in *Cookney v. Anderson* (1 De G. J. v. S. 365), that this power to order service abroad was confined to cases under 2 Will. IV. c. 33, and 4 and 5 Will. IV. c. 82, that is to say, in suits relating to land in England, or concerning any charge, lien, judgment, or incumbrance thereon, or concerning any money vested in any government or public stocks, or shares in public companies or concerns, or the dividends or produce thereof. But this was reversed in *Drummond v. Drummond* (L. R. 2 Ch. App. 32), where Lord Chelmsford affirmed that the power of serving a subpoena on a defendant abroad existed before the statute in question, and was quite nugatory unless the defendant voluntarily appeared ; but that under the powers conferred by the Acts 3 and 4 Vict. c. 94, and 4 and 5 Vict. c. 52, the Court of Chancery had framed the Order of 1845 in the most general terms, and made it apply to "a defendant in any suit out of the jurisdiction of the court." The power conferred by the Act of 1841 was a general one, not to extend jurisdiction, but to alter process, pleading, and course of proceeding in respect of the expense and delay which then obstructed the business of the court. The rules made by the judges took the enormous step of authorizing the judge to direct the action to proceed, although no appearance was made for the defendant. No doubt the order for service in such cases was not

made as a matter of course. At least the court always inquired whether due notice had been given, and in one case (Blenkensop, 2 Phillips, 1) L. C. Cottenham seemed to hint that although no affidavit on the merits was required, the order would not be made if the suit related to property out of the country. And the courts have also hesitated in cases relating to the distribution of intestate bankrupt estates. But the view generally taken of the power of the court is expressed by Sir. Jas. Wigram in *Whitmore v. Ryan* (4 Hare 612), a suit by the assignees of an English bankruptcy against a Dublin merchant who had traded with the bankrupt: "I do not think it necessary that I should express any opinion whether the Act of Parliament, and the orders made in pursuance of it, are proper or not with reference to questions of international law ; nor whether it may be considered certain that foreign countries will treat as conclusive the judgments of this country pronounced in the absence of a party who has not appeared to a subpoena served on him in a foreign country." The only question was whether the court had power under the general order, and in this very case the Vice-Chancellor restrained his jurisdiction, although the plaintiff gave no explanation why he did not file his bill in Ireland. It is impossible to deduce from the reported cases what was the "discretion" which the Chancery judges exercised in the matter.

We have now stated the new Rule 1 under Order XI. of 1875, and we have explained the claims of jurisdiction made prior to that date by the English Courts of Common Law and Chancery respectively. Before proceeding to comment on the decisions which have occurred since 1875, and which led to the restriction of Rule 1 by Rule 1a, we must draw attention to Rule 2 of Order XI., which relates to probate actions, and provides in the most absolute manner, and without any of the definitions or restrictions contained in Rule 1, that in such actions service may be permitted out of the jurisdiction. This, as Mr. Griffiths, the most recent writer on English practice, has observed, obviously implies a much more extensive jurisdiction in the case of probate actions, but the meaning of the rule has not yet been ascertained by practice.

In *Preston v. Lamont* (May 26, 1876, 1 Exc. Div. 361) an ordinary petitionary action was raised against a Glasgow merchant, who had made a contract with the plaintiff in Scotland. The defendant appeared and applied to have the service set aside as not authorized by Rule 1. The Court held that where a defendant had appeared he could not plead want of jurisdiction. His course was to appeal against the order of the judge permitting service, which it must therefore (apparently) be possible to do without "appearing" in the technical sense. Baron Amplett explained that this was a speedy and inexpensive mode of determining the question before any expense is incurred upon the merits of the action. In *Swansea Shipping Co. v. Duncan, Fox & Co. and British Agricultural Association* (cited to appear, May 24, 1876, 1 Q. B.

Div. 644, which was an action by the shipowner against the affreighter for demurrage, for failure to unload, an order for service was made on the Scotch Company, who were not holders of any shipping documents, and were no parties to the contract of affreightment, but had merely bought the cargo "to arrive," and had ordered and taken discharge at the port of Leith. The order was made under Order XVI. (Rules 17, 18), on the ground that the question between the parties was identical, and that there was a right of relief in the English defendants against the Scotch Company. Cockburn, C.-J., Quain, J., and Pollock, B., recalled this order on the ground that the question did not appear to be identical. On appeal this decision was reversed, and it was held that the provisions of notice to Order XI. as to foreign service applied to the case of third parties under Order XVI, an enormous extension of jurisdiction, as we shall immediately see. But as the contract in this case was undoubtedly made in England, the decision does not add anything to the construction of Order XI. In *Green v. Browning* (May 27, 1876, 34 L. J. U. S. 760), a London contractor, who had agreed with the defendant, a domiciled Irishman, to construct a rink in Dublin, sued for the contract price; and the Court of Queen's Bench sustained their jurisdiction. Cockburn, C.-J., observing that he would have been sorry if the order had not included such a case. In *Scott v. Royal Wax Candle Co.* (April 10, 1876, 1 Q. B. Div. 404) it was decided that Order XI applied not only to individuals, but to corporations abroad, thus changing the former law of England under the Common Law Procedure Act, that a foreign corporation could not be sued unless it did business and had an office and manager in the country. The affidavit on which the order to serve proceeds must be by a person able to depone to the facts that he is advised, and believes there is a good cause of action arising within the jurisdiction, and stating in distinct terms what the cause of action is (*Great Australian Mining Co. v. Martin*, 3 Ch. Div. 1).

These cases, and some others relating to the service of writs in Ireland, excited great opposition, especially among the Irish solicitors; and, chiefly in consequence of their representations, the Rules of the Supreme Court of June 1876 contained the following important qualification of Rule 1, Order XI, in cases relating to contracts:—"The judge, in exercising his discretion as to granting leave to serve on a defendant out of the jurisdiction, shall have regard to the amount or value of the property in dispute or sought to be recovered, and to the existence in the place of residence of the defendant, if resident in Scotland or Ireland, of a local court of limited jurisdiction, having jurisdiction in the matter in question, and to the comparative cost and convenience of proceeding in England or in the place of such defendant's residence, and in all the above-mentioned cases no such leave is to be granted without an affidavit stating the particulars necessary for enabling the judge

to exercise his discretion in manner aforesaid, and all such other particulars, if any, as he may require." Since the date of this additional rule we have observed only two decisions of importance. The first is *Casey v. Arnott* (Nov. 4, 1876, 2 C. P. Div. 24), where it was found that slander of title, spoken in Ireland respecting a ship in England to which unseaworthiness was imputed, did not justify an order being issued to serve in Ireland. Grove, J., said that property could not be affected within the meaning of the order by mere words spoken about it. Here only the minds of intending purchasers were affected. The property must be physically affected, or the right of property must be affected. The second case is *Mackenzie v. Shepherd* (March 1, 1877, 21 Sol. J. 339), where Mrs. Mackenzie asked the Court to set aside, on the ground of fraud, a settlement made by her when a domiciled Scotchwoman at Edinburgh, and in the Scotch form. One defendant was an S.S.C. in Edinburgh, the other was a Scotchman resident in business at Cognac, but with an office in London. They were trustees. The plaintiff and her husband had lived in London since their marriage. Leave to serve on Henderson was given on the ground that some debenture bonds of the Otago Investment Co. (Limited), being property settled by the trust-deed, were situated within the jurisdiction, the Company's head office being in London. Henderson pleaded that the whole subject-matter being Scotch, Order XI., Rule 1, did not apply; and that even if it did, the case was not one for the exercise of the discretion given by Rule 1a. The Otago bonds were in the possession of Henderson in Scotland, and all the material witnesses were there. Vice-Chancellor Hall said that, if the case proceeded before him, he would require the assistance of a Scotch court, and in the circumstances the balance of convenience was against a litigation in England. He therefore discharged the order.

In a second paper we shall endeavour to state the claims of the Scotch and Irish courts.

ON CERTAIN PRINCIPLES AFFECTING THE LIABILITIES OF MASTERS AND SERVANTS.

NO. III.

As regards the proposals made for the alteration of the existing state of the law, and for the extension of the liability of the master for injury to his servant, there appear to be two separate features and lines of argument. In the first place, we find one body of reformers desirous of entirely abolishing the doctrine of "common employment," and sweeping the whole affair away at once; and again, on the other hand, we find those who, seeing the necessity for change, think that an effectual remedy may be found in an ex-

tensive modification in the laws of delegation of duties, and in the consequences to the employer of intrusting to another that which he is supposed theoretically to be doing himself. We shall endeavour more closely to examine these two aspects of the difficulty, and to consider them in detail; meanwhile it may be mentioned that to the first proposal belong such measures as Mr. Macdonald's Bill on the "Employer's Liability for Injury," and to the second the suggestions made by the Committee of the House of Commons in their Report.

A comparatively cursory examination of the evidence given before the Committee would probably lead to the conclusion that, as a whole (putting aside, of course, the technical evidence of lawyers), it was strongly for the employers or for the employed, and we must therefore make allowance for the bias of the witnesses, in some cases very conspicuous. There were, however, some few exceptions where, from local circumstances, absence of personal feeling, or other cause, the most clear-headed, unprejudiced opinions were obtained, and these we propose in particular to dwell upon, after as brief a summary as possible of the *pros* and *cons*. Those who advocated a change of a sweeping character were not sparing in their condemnations of the existing rule, but that condemnation varied much in its extent, and in the manner in which it was expressed. The majority of the witnesses who appeared to give evidence against the existing state of the law were connected more or less directly with trades-unions, in the capacity of miners' agents or as secretaries of mining associations in England and in Scotland; and in reviewing the evidence thus given, it will probably be the most intelligible and convenient plan to take first the witnesses who advocated the most extensive changes, and then those who, from the workmen's point of view, looked at the question more calmly. Among those whose opinions were very strongly expressed, one, the secretary of a Yorkshire association, thought that all accidents occurring through negligence ought to be compensated for by the employer; he considered that this would greatly diminish the number of accidents, and he gave examples of cases where managers had been prosecuted and fined in connection with accidents, showing the carelessness or neglect, but where, in the present state of the law, nothing could be done in the way of recovering compensation for the injured from the colliery-owner. "I believe," he adds (evidence of Mr. Pickard, Report, p. 5), "that the owner should be held responsible for all accidents attributable to neglect other than that of the person injured. I am of opinion that if a coalowner engages a certified manager to superintend, or a consulting engineer, he should be held responsible and liable for any action they may take in the management of such mine; also for any result following the relegation of their powers, either to deputies, deputy-steward, or to any person having the life and limb of the ordinary workman in his hands to

any extent." Further than this, it was the opinion of the witness that, even where an unexpected and unforeseen efflux of gas causes an explosion, "the men ought to be compensated;" and that, similarly, liability should be incurred by the master where, for example, a miner employed his own hurrier or boy, paying him his own rate of wages, and where the boy or hurrier was by the carelessness of the miner himself injured. "The manager of a mine ought to know all the men he employs, and all the boys too, and the manager should know all the ins and outs of the collieries every day; and if he does not find out for himself that there are parties in the mine who should not be there, then the manager is neglecting his duty." With reference to the giving in of adverse reports when the safety of the workmen was endangered by negligence or by the state of the pit, it was elicited that although no direct instance of loss of employment from this cause could be shown, yet after giving in a report of this kind the men had not long to work in that colliery. "In cases of this kind," the witness fairly said, "it is very difficult, where a man's living is at stake, to speak out boldly;" and he had himself, he remarked, dissuaded men from publishing any report beyond entering the facts in the colliery-book, so that they might fall under the notice of the inspector at his official visit. As to an accident where it had been caused by the persistent doing of an act known to be dangerous, and which the doer was warned against, but where his fellow-workmen had not time to get away, even there, the witness thought, the employer should be responsible, and that, as to civil responsibility on the part of the workman who caused the injury, he should not be liable "in the sense that we would hold the owners responsible."

Another miners' secretary, a Scotchman, was in favour of prohibiting the employer from contracting himself out of liability (evidence of Mr. Gillespie, Report, p. 129), and considered that when a man was taken into employment at a mine, "his character and qualifications ought to be thoroughly sifted;" he also approved of rendering a master liable in compensation where a man was not known to be reckless, but, on the contrary, was known to be a careful and good miner, if he made a mistake resulting, for instance, in an explosion. No difference was, according to this view (evidence of Mr. Cook, Report, p. 15), to be made whether the deputies or workmen engaged were competent or not, whether the utmost care had been exercised or not in their selection; it was sufficient for the purpose that they had not competently discharged the duty for which they had been appointed; the test was to be sought only in the result. Thus if a man lighted his pipe and caused an accident in a gassy mine, the master would be responsible, even though the act were contrary to the rules. The same witness being asked whether, in the first instance, the man who did the injury ought not to pay for it, replied that the individual might have no share of the profits, whereas the employer, having all the profit, might be

expected to be able to pay him: "Seeing that the profits all go there, I think it only stands to reason that compensation should come out of the same place." One member of the Committee, to test the views expressed, put the case of a footman in the country wishing to go to the railway station, and asking his master's permission to let the coachman drive him thither in the dogcart. In these circumstances the witness thought that if the dogcart were upset, and the footman was injured through the negligence of the coachman, the master should be made responsible. Summing up the opinions expressed by these more extreme witnesses, we should, if they received legislative effect, render employers liable under almost every known combination of circumstances, except where the injured man or his representatives were suing, and where contributory negligence had caused the accident. Such, however, was not the unanimous verdict of the witnesses on this side of the question, the next stage of opinion being, perhaps, fairly represented in the evidence of Mr. Brown (Report, p. 105), who would make "the colliery-managers, the managers of all kinds, right away from the certificated manager down to the lowest subordinate in connection with collieries, liable." It was pointed out with some force how little in the relation of "collaborateur," taken in the true sense, the certificated manager stands to the miner; and how, in point of fact, very often these managers in their turn delegate their duties, and very rarely (seldom oftener than once or twice a week) go down into the mine, attending frequently to the general commercial affairs of the owners, and being regularly found "on 'Change." A strong distinction was drawn by this witness, apparently, between the consequences of an explosion and other kinds of accidents. He thought the owner should be responsible for any act done, no matter who did it, when an explosion occurred. The explosive gas was present; it should not have been there, because it was capable of removal by sufficient ventilation, and that had not been forthcoming; hence the inferred liability. On the other hand, the case of one man holding and another striking a drill was put by the witness, who considered that if in this operation the striker injured the man holding the drill, the employer should not be liable. Again, the case of a boiler explosion was suggested, where all things were sound and good, and where the accident was caused by one of the workmen. Here it was thought by the witness that the employer should prove that he was not to blame in any respect. "I should not think it fair," he said, "if the employer had done all he could, if the certificated manager had done all he could, and every subordinate manager had done all he could, and then a reckless workman caused an explosion which injured workmen or killed them instantaneously," to make the employer responsible; what generally this came to was that the question was one for a jury, with the peculiar addition that the onus of proof lay with the employer, the presumption being apparently against him. Thus in a case of boiler

explosion, even where that might have been caused by letting cold water flow into a heated and empty boiler, the owner would have to prove, were a claim of compensation made against him, that the boiler was in good condition and sound in every way. The mere age of it brought out to a jury might have the effect of misleading them one way or another, whereas if the proof were thrown upon the pursuer in such cases, it could scarcely lead to any miscarriage of justice, and would probably much simplify the proceedings.

Finally, among those who gave evidence in favour of a change in this branch of the law of liability, there were several who, while taking very decided views of the matter, expressed them most temperately and sensibly. For example, one witness observed that where there was really some act which showed negligence on the part of the servant of an employer the master ought to be made liable, but that there were hundreds of accidents occurring among workmen for which an employer could not possibly be called to account or mulcted in compensation. An instance of great hardship was given, where some shores underneath a vessel were removed by the manager, the result being that the vessel turned over, killing four and injuring seventeen workmen. The verdict of the jury at the inquest was, that the accident occurred "through the culpable neglect on the part of the officials of the yard." That verdict exonerated the master, and an attempt by the Trade Society to obtain compensation for the widows and the injured was in consequence unsuccessful. The two following passages from the evidence of Mr. Crawford (Report, p. 2), secretary to the large association in Durham, with a membership of some 40,000, well express the opinions of the workmen who have seriously thought out this, to them, all-important subject, and we may therefore be pardoned for quoting them at length:—

"Mine-owners begin to work mines, and workmen work in them, fully cognizant of all the risks to be endured. But the workman has a right to expect, and does expect, that in following his hazardous occupation his risks will be reduced to a minimum, both by the establishment of every modern scientific appliance for the safe working of mines, and also by those in charge exercising the most vigilant watchfulness and the utmost caution. Even when this is done accidents will still occur. But of whatever nature an accident may be, if there has been exercised, by those in charge for the time being, necessary care and competency, we do not seek to hold either owner or any one else responsible for such accident. We only seek to render an owner responsible when in evidence it is shown that such accident might have been prevented by an exercise of necessary caution and ability by those in charge, and to whom for the time the owner had delegated alike his power and responsibility. . . .

"In common fairness and equity I think that if the individual employer is responsible for his own act, so the owner who delegates his authority for the carrying on of the work to one or many, ought

to be responsible for the acts of all those that do what he himself would do if he did not so delegate his power. Yet if the negligence or incompetency of any one of these men, or of all combined, cause the death of either one man or any number of men, the owners are at the present time beyond the reach of the laws. Instance upon instance might be given of what I am now saying. Take one as illustrative of many. Some four or five months ago three men and one boy lost their lives by an explosion of gas in a mine in the county of Durham. The cause of the accident was so clearly brought home to the negligence of the certificated manager that a Court of Petty Sessions fined him £20 and costs. But there the matter ended; the owners, or even the head manager, being beyond the reach of law, although a widow and three children were left unprovided for. Still, while the cause of the accident was brought so clearly home to the negligence of the person having charge of and acting directly for the owner of the mine, we could not claim, by the operation of the present law, the least compensation."

The same witness also pointed out an anomaly which strikes every one who devotes even moderate attention to this branch of our law. When a man is poor and possesses not the means of employing a manager, or other subaltern to whom he may delegate his authority, then he is responsible for any accident occurring in his pit or workshop where the exercise of common precautions and ability could have averted the mishap. Yet change the position of the man, give him plenty of money, or a more extended business which he is not able personally to superintend, and instead of being liable for the blunders of his manager, he has really interposed an effectual shield between himself, now a rich man, and the operation of that very law which came down upon him as a poor man. We cannot help feeling, with the workmen, that though this may be, and undoubtedly is, the law, it is not what can be regarded as substantial and satisfactory justice.

The last of the witnesses upon this side into whose evidence we propose to look is Mr. Burnett (Report, p. 19), who illustrated his remarks by reference to several very instructive and interesting cases of accidents which had come under his personal notice, owing to applications being made for relief out of the funds of the Amalgamated Society of Engineers, of which he was the secretary. It appears that this society preserve records of all such cases, and thus were enabled to present them in a concise and forcible shape. One instance was that of injury, a broken arm, caused by being caught when in the act of putting a belt on a wheel. The deduction drawn from this was that the employer should have been held liable unless it had been one of the standing regulations of his workshop that no workman should attempt to put on a belt without having the speed of revolution in the wheel reduced to a certain amount. In such circumstances the witness thought the workman by doing what he ought not to have done would lose all claim for

compensation. The order of the master had been negligently or wilfully disobeyed, and the man was, moreover, contributory himself to the accident which befell him. To stop the machinery, or at least slow it, in a large place, entails, it was shown, much loss of time, and accordingly the necessity of the circumstances often drove men to run the risk so frequently attended by disastrous consequences. Of course the weak point in this example lies in the fact that the man undertook to put on this belt, not under the orders of any one, master or foreman, or other, but at his own hand. Another case given was that of a man whose hand was crushed fearfully by an engine being set in motion without notice when he was engaged working among some toothed wheels. This is a stronger case for the workman, as the engine was in charge of a special person representing the master. Examples were given of cranes being used to lift too great a weight and injuries resulting to those working around; and of chains giving way, both of which, being preventable, it was urged, should fall under the class of cases where the employer might be rendered liable. A very frequent cause of accident and of disablement in the engineering trade arises from a piece of steel or of metal flying from the chisel and striking the workman in the eye, and this being a cause of injury beyond all control, the witness was not for rendering the employer liable. In a similar light he regarded an accident caused by the flying of a piece of steel from the head of a chisel when struck by a heavy hammer; but a distinction was drawn between such a case and another which actually occurred, where a chipping from a neighbouring anvil struck a workman engaged at a steam-hammer. It appears that a smith requires frequently to go from his own anvil and fire to the forge-hammer for heavier work; in the case put, while so engaged at the large hammer, he was struck, and the theory of responsibility laid down by the narrator was that the employer was liable, because the forge-hammer being a place to which all the workmen in the shop would have occasion from time to time to resort, there ought to be between it and the nearest other fire and anvil such a distance as to secure the safety of those who were at it from pieces of metal flying, or else that guards or protection of some kind should be used. In all of these instances given there appears to be not merely an unreasoning inconsiderate opposition on the part of the workmen to the law as it exists, because it may be or is supposed to be favourable to the employer rather than to themselves; but a wider and more deliberate consideration of the duties of those concerned, of the position in which employer and labourer stand as regards a business known to have its hazards, where neglect on the one hand and personal carelessness on the other may equally lead to fatal results. Two other examples given by the same witness (Report, p. 21) may be cited *in extenso*, for they are expressed tersely and to the point. The first was the case of a sea-going engineer. "While at sea he was busy oiling the

engine, and, while stepping down from the condenser on to one end of the engine bed-plate, his foot slipped over the edge of the bed-plate, and between the bed-plate and the swing of the crank; the crank then coming round caught the leg, and tore the lower part of it all to pieces. Amputation was necessary, and the man was disabled for life. But it is customary, in marine engineering, to put on a small piece of angle iron on the corner of the bed-plate, to prevent such accidents. In this case there was no angle iron on the bed-plate; therefore there was a liability in that boat to accident to the engineer which did not exist in the majority of boats; and in that case I should hold that the employer was liable to pay the man compensation. But, even in that case, had it been tried (and I may say that advice was taken in reference to that), the usual loophole would have presented itself; because all owners of steamships, especially large owners, now employ managing engineers, and those managing engineers are held liable for keeping the engines in generally proper condition. The inspecting engineer of the steamboat, therefore, would have been held to be a fellow-servant of the engineer who was injured; and, therefore, the doctrine of common employment would have been set up, and the man would have lost his case."

The second example given was that of an inspecting officer of Volunteers, who, being obliged to go on duty from Newcastle to Hexham, missed his train, and applied to the Newcastle stationmaster for a special engine. This was given him, and on it he started for Hexham. To complete the account in the words of the witness: "Before the special engine started the ordinary train had not arrived at the intermediate station to which the telegraphic communication of the company extended. In that case the stationmaster could have telegraphed to Blaydon, and instructed the stationmaster there to put a notice on to the last carriage of the ordinary train, 'Another train following.' In that case the officials of all the stations further up the line to which there was no telegraphic communication would have been warned. But nothing of that sort was done, and the stationmaster at Wylam Station, hearing something like the noise of an approaching train of which he knew nothing, came out of the warehouse attached to the station, and looked along the line; he had scarcely done so when the locomotive came past with the inspecting officer on it at the rate of fifty miles an hour, and he was struck down and killed instantly. That was a case in which many solicitors were consulted, and the relatives of the deceased man were advised not to take proceedings, because the usual plea would have been put up that the head stationmaster at Newcastle was the party who, by his negligence, caused the death of the country stationmaster, and therefore his family would have been debarred from receiving compensation."

Generally speaking, the result of the inquiry, so far as regarded this witness, indicated a desire for a change in the law so far as un-

doing the judicial doctrine of common employment was concerned, thus far leaving all questions of liability to work themselves out on their simple merits; neglect or no neglect on the part of the employer or those who represented him; fault or no fault on the part of the workman contributing to the mishap, and so relieving the master from his responsibility.

Thus far we have considered the attitude taken up by those who gave their evidence from the workman's aspect of the matter; but before we take up the evidence given on the other side of the question we must notice another indication of the feelings of workmen finding expression in the Bill introduced by Mr. Macdonald, M.P., on this very subject. That Bill contains but four clauses, in these terms:—

"1. Where any action or proceeding is brought for recovery of damages or of compensation in respect of bodily injury or loss of life, alleged to have been occasioned, after the passing of this Act, to any person, it shall not be any ground of defence that the person by whose negligence the injury or loss of life is alleged to have been occasioned was employed in a common employment with the person injured or killed, or that the risk of injury or loss of life was knowingly or voluntarily incurred by the person injured or killed in the course of his employment.

"Provided that this Act shall not render any person liable to pay damage or compensation in respect of injury to or the loss of life of any person where it is made to appear that the person injured or killed materially contributed by his own negligence to the causing of the injury or loss of life.

" 'Common employment' means any such community of employment, service, or occupation as, but for this Act, would be matter of defence in any such action or proceeding as aforesaid.

"2. No action shall be maintainable in a case in which such action would not have been maintainable but for this Act, unless notice that such action will be brought is given within *six weeks*, nor unless the action is commenced within *six months* from the occurrence of the accident causing the injury or loss of life.

"3. Any action against an employer for damages or compensation in respect of bodily injuries or loss of life occasioned to a servant or workman employed by him in the course of the employment of such servant or workman, may be brought in a County Court, and in Scotland in the Sheriff's Court, and in Ireland in the Civil Bill Court, whenever the amount claimed does not exceed *two hundred pounds*.

"4. Where injuries not resulting in death are caused to a minor by reason of the negligence of any other person, and damages are recovered for such negligence, it shall be lawful for the Court before whom the damages are recovered to direct that the amount of such damages shall be paid to and held by such person as the Court, with his consent, directs, in trust for the minor; and such amount shall

be applied for the education or advancement of the minor, or otherwise for his benefit, as the Court or a judge of the High Court of Justice may from time to time direct."

Now when we examine this Bill, it is at once apparent that the first clause contains two features very different from one another, and quite subversive of those principles of law at present affecting the liability of employers. On the one hand, the defence of "common employment" is abolished *simpliciter*, without any attempt to distinguish between delegation of authority or of certain duties and simple combined labour towards the attainment of one result; the Bill would make no difference, for example, between the case of the certificated manager of a pit by his neglect causing serious loss of life and injury to the workmen, and the case of two railway porters ordered to push a waggon into a lye, when one was injured by the carelessness of another. We make these observations at present merely to show the scope of the proposed measure, not to criticize its effects, observations of that kind being reserved until the other side of the evidence has been examined. On the other hand, this clause of Mr. Macdonald's Bill excludes any defence founded on knowledge of risk by the workman, and on voluntary incurrence of it. It would not, therefore, signify in the least whether two men sent to explore an unused working, for example, were warned particularly against the danger of gas, and whether, despite this, one of them lighted his pipe, causing the death of both, an action at the instance of his companion's representatives would seem to be quite competent. Again, when a pit had caught fire, the volunteer descent of men seeking to check the flames would, in event of accident, render the consenting owners responsible in damages, for the men, adopting every precaution, could not be said by any negligence to have contributed to the result. Again, it would not be any defence to produce a contract of any kind whereby the employed undertook (say in consideration of additional wages) the risk of his work. After these provisions we have one as to exclusion of claim in cases of contributory negligence, and then a definition of "common employment" based upon what would be sufficient to found a defence of this nature in the now existing position of the law. The second clause of the Bill contains a provision very proper in all such cases, limiting the period within which the action must be brought to six months, and providing that "notice" must be given within six weeks from the fatal or injurious occurrence. It is not stated, however, what this "notice" requires to contain, and at present grave difficulties in practice might arise from irregular and informal intimations. Were any change of this kind to be introduced in the law, it would be necessary to render the terms of the notice specific, perhaps even to schedule them. The third clause probably would have a tendency to restrict the claims for compensation to sums below the £200 mentioned, in order that the expenses attendant on actions raised in the superior courts might be

avoided. Nothing, however, is here said as to the right of appeal. The fourth clause relates to damages actually recovered where the recipient is a minor; but the Bill proposes that, when the funds are held in trust under the orders of the Court, the trustee shall apply, not to the Judge Ordinary of the district, as we might have expected after the provisions of clause 3, but to a judge of the High Court of Justice.

(To be continued.)

NOTES IN THE INNER HOUSE.

Two cases have recently been decided in the Court of Session which possess peculiar interest for tenants of land. In *Hardie v. Duke of Hamilton* the pursuer held a farm of the defender under a nineteen years' lease. For seven years, from 1869-70 to 1875-76, the pursuer complained of damage being done to his crops by the over-preservation of game and rabbits. During each of these years he made specific complaints, both verbally and in writing, to the defender's commissioner, had the damage estimated by men of skill, and statements of such damage given to the defender, with an intimation that he held him responsible. The pursuer also averred that until 1874 he was in the habit of getting deduction from his rent to the amount of the estimated damage done by the game, but that since then, not only had he got no deductions, but, under threat of sequestration, had been made to pay back the deductions he had previously received. The defender, on the other hand, stated that the pursuer had only been allowed a deduction one year, that it was accepted as in full of all claims, and that the rents, with that one exception, had always been paid without deduction. This being the case, the defender argued that as the claims for damages had not been insisted in at the time, they could not be pressed now, as there was now no means of estimating the damage. He quoted the case of *Broadwood v. Hunter* (2nd Feb. 1855, 17 D. 340), in which it was held that a tenant had no right at the end of his lease to claim damages for bygone years, if he had made no relevant claim at the time, and had paid the rent without deduction. The First Division, however, were unanimously of opinion that the case just quoted did not apply, as Hardie had each year made a distinct claim for damages, and not, as the Lord President put it, "mere general grumbling and complaint." The Court, therefore, affirmed the judgment of the Lord Ordinary which was reclaimed against, and allowed the pursuer an opportunity of proving his case.

In *Gosling v. Brown*, decided by the Second Division on 8th March, a very important question arose. The circumstances of the case were shortly as follows: In November last year Brown, the son of a Dumfriesshire farmer, was sued by the Excise authorities

before the justices for a penalty of £10 under the Gun Licence Act, 33 and 34 Vict. cap. 57. By that Act it is provided that any person carrying or using a gun shall be liable in the above penalty; but by sec. 7, sub-sec. 4, it is enacted that such penalty shall not be incurred "by the occupier of any lands using or carrying a gun for the purpose only of scaring birds or killing vermin on such lands, or by any person using or carrying a gun for the purpose only of scaring birds or of killing vermin on any lands by order of the occupier thereof, who shall have in force a licence or certificate to kill game, or a licence under this Act." Brown's father had a gun licence, and authorized his son to carry his gun to scare birds and shoot vermin on the farm. Under this authority young Brown on one occasion shot at one rabbit and killed another; this, the Excise authorities contended, he was not entitled to do, and sued him before the Justices, who assailed the defender. This decision was affirmed on appeal to the Quarter Sessions, and eventually a case was submitted for the decision of the Court of Session, in which the following questions were put to their Lordships: (1) Whether rabbits were vermin within the meaning of the Act? and (2) Whether the conclusion at which the Justices had arrived was a question of law and not of fact, and whether the fact that the respondent had killed a rabbit was not in itself sufficient grounds on which the Justices should have found that he was carrying a gun for a purpose other than that in the exception "of scaring birds or killing vermin"? The Court, *dis.* Lord Ormisdale, affirmed the decision of the inferior courts and dismissed the appeal. The Lord Justice-Clerk thought that the Justices were quite entitled to arrive at the conclusion which they did. As to the question of rabbits being vermin, it was pointed out that although nominally the son was charged, it was in reality against the father that the Excise were proceeding. The tenant had a right by law to kill rabbits on his farm simply because they were noxious and destructive animals. This was settled in the case of *Moncrieff v. Arnott* (13th Feb. 1828, 6 S. 530), where it was unanimously held by the First Division that rabbits were not game, and that a tenant was entitled to kill them for the protection of his crops without the consent of his landlord. The principles laid down in that case have never been disputed; they were expressly recognised in a late case, *Inglis v. Moir's Tutors and others* (7th Dec. 1871, 10 Macp. 204), when it was remarked by the Lord Justice-Clerk, that "if a tenant is put under no restriction by the terms of his lease, he is entitled to destroy rabbits as an ordinary agricultural operation necessary to the cultivation of the farm." Lord Cowan also gave it as his opinion that a tenant had a right at common law to kill rabbits. The tenant having this right, he was entitled to exercise it either personally or by his servants, it being necessary in either case, however, for him to possess a gun licence. By the exception in the Act he was entitled to communicate his

without recognising the strong, powerful, masculine grasp of his understanding.

His eldest son, William, was educated in the first instance at the High School of Edinburgh; and was subsequently a pupil of Mr. Tate of Richmond, in Yorkshire, whose seminary at that time was in great repute. Tate was a scholar of no mean order, and there will be found in the "Memoir of Professor Dalzel," by Mr. Cosmo Innes, some pleasing notices of him. He was afterwards a Canon of St. Paul's Cathedral.

For some years after his admission to the Bar, Mr. Gibson followed his profession, and his name appears occasionally in the Reports. But in 1823 the old estate of Riccarton, which had belonged to Sir Thomas Craig, devolved on his father, and he and the family adopted the name of Craig in addition to their own. From this time forward Sir William ceased to prosecute his active labours as an Advocate, and looked forward to a political life. He adopted the politics of his father, who was created a Baronet in 1831; and he became a very zealous and efficient member of the distinguished circle of Whig leaders, which was at that time the boast and glory of the Bar and the ornament of Edinburgh society. With them, including Jeffrey, Cockburn, Rutherford, Murray, and the other well-known names, he lived on terms of the closest intimacy and friendship; and in 1837 he was elected member for the County of Edinburgh. At the election of 1841 he became member for the City of Edinburgh, a seat which he continued to hold until 1852. His father having died in 1850, Sir William succeeded to the title and the estate of Riccarton, and on the dissolution in 1852 he finally quitted Parliament, after having been a member for fifteen years.

During his Parliamentary career he made many and fast friends, and was one of the most popular men in the House of Commons. His easy, well-bred, and genial manners made him universally acceptable in society; and although he never attempted oratory in the House, for which his somewhat fine-strung temperament rather disqualified him, he rapidly acquired influence from his strong good sense, energetic business habits, and knowledge of men as well as of affairs. The friendships which he made at that time continued unbroken long after he had ceased to have any direct connection with politics. With most of the members of the Whig Administrations of 1837 and 1846 he lived on terms of intimacy, and was always remembered and spoken of afterwards with respect and kindness by his old comrades. Lord Russell, Sir George Grey, Sir Charles Wood, now Lord Halifax, the last Lord Dalhousie, and many others of the same circle, continued to be his close friends. With Macaulay, who had been his colleague in the representation of Edinburgh, and whose temporary defeat he bitterly resented, he had relations of the most intimate and affectionate kind, which only ceased with that distinguished man's death.

In 1846, on the formation of Lord Russell's Government Mr. Gibson-Craig was appointed the Scottish Lord of the Treasury; and in that capacity he conducted the affairs of Scotland, in conjunction with Lord Rutherford, then Lord Advocate, with eminent ability and success. Only those who have some experience can tell the difficulties which beset a Scottish Lord of the Treasury; but in Sir William Craig's case they were successfully surmounted. The office in his hands was no sinecure. He was master of the work, knew what was to be done, and did it. No one understood better than he the merit of persistency in public affairs; and he never left his end unaccomplished, while accomplishment was possible, for want of resolute and incessant efforts. Much of his work in this department, important and thorough as it was, escaped the notice of, and therefore was insufficiently appreciated by, his countrymen. One signal and enduring instance of it, however, resulted in the grant for the Institution Buildings in Edinburgh, which, in conjunction with Lord Rutherford, he was successful in obtaining. The main merit, however, of his public administration, like that of many other able public servants, never came to the surface, and was only in fact indicated by the absence of friction, the result of complete and careful work.

Sir William Craig's fifteen years of Parliamentary life must have been full of interest in retrospect as well as at the time. He lived through a period of great events, and on terms of confidence with some of the greatest of the actors on that stage. The Irish Appropriation Clause, the repeal of the Corn Laws, the downfall of O'Connell and the rise of Disraeli, the Irish Rebellion and the events of 1848, the Chartist day in London, the Ecclesiastical Titles Bill, and the split between Lord Russell and Lord Palmerston on foreign affairs,—these, and the surrounding questions, and the alternation of parties and Governments which marked that time, formed a considerable political experience. His familiar and daily intercourse with the leaders on his own side, and acquaintanceship with most of the foremost men in the House of Commons, must have made him cognizant of the political history of the time, read from a point of view which few have the advantage of enjoying. His six years of official life were very advantageous to his countrymen. Easy and ready of access, with perfect acquaintance with the details of his own department, quite able to hold his own and repel intrusion from any quarter, he raised the office of Scottish Lord of the Treasury to an importance and efficiency which it had not always maintained.

At all events his experience of affairs on this comprehensive scale gave maturity to his judgment, and weight to his counsels which were invaluable in his after-years. After ten years spent at his seat at Riccarton, six miles from Edinburgh, he was offered the office of Lord Clerk Register, vacant by the death of Lord Dalhousie, the Governor-General of India.

A considerable salary had been attached to this office, the holder of which is one of the Officers of State; but as Lord Dalhousie, while Governor-General of India, neither discharged the duties nor drew the emoluments of the office, the salary attached to it was abolished, and in 1862 the honorary appointment was conferred on Sir William Gibson-Craig, without salary, but with a seat in the Privy Council.

Unpaid, however, as the office was, it was not in the nature of the new Lord Clerk Register to allow any position which he held to become a sinecure in his hands, while there were appropriate duties falling within its functions; and he threw himself into the affairs of that large and most important department with characteristic intensity and success. Our limits will not admit of our entering in any detail into his labours in the Register House, or their value to the public. He very soon found that, rightly discharged, there were duties within the sphere of his office of the largest and widest scope; and he set himself with vigour to accomplish the reforms which at last took shape in 1867, following out the recommendations of a Parliamentary Committee which sat in 1865. Among these recommendations was one to the effect that, looking to the nature of the duties of the office of Lord Clerk Register, it ought not to remain without a salary being attached to it, and this recommendation was carried into effect by the Act of 1867; not an unreasonable step, considering the work to be done, and the fact that the department contributes a large balance to the general funds of the country.

We could not do justice to the labours of Sir William Gibson-Craig in this department without passing in review the whole system of records which he entirely revised and re-formed. We can only stop to take notice of one portion of his labours which has left an enduring impress on Scottish history. We allude to the publication of the "Ancient Historical Records of Scotland," and to the "Index to the Statutes of the Parliament of Scotland." These are works of lasting utility and interest. The latter especially constitutes in itself a history of Scotland more full, copious, accurate, and trustworthy than any other, because it speaks in the voice of the Parliaments of the time. There is no subject of research, legal, social, genealogical, or political, connected with Scotland in the last four centuries, the materials for which are not to be found in this most important volume.

In these great national works Sir William Craig had able and zealous coadjutors. But it was not without long-continued and unremitting exertion that he was able to complete them. Indeed in the end he sacrificed too much of his ease, and even his health, to their success. In these matters, which compelled constant negotiations with the Treasury, nothing but his old official knowledge and familiarity with public departments could have overcome the ever-recurring obstacles which beset his path. He

succeeded, fortunately for the public ; but, it is to be feared, not without his exertions contributing to shorten his valuable life. It will be long before the Lord Clerk Register's ancient office, and the extensive interests over which he presides, will be able to boast of a more energetic, vigorous, and successful administrator than Sir William Gibson-Craig.

But neither in the sphere of politics nor of official life did the main charm lie which endeared him to all who knew him while he lived, and has caused such widespread and genuine sorrow at his death. It was to be found in his high, manly, and honourable feelings, his genial manners, and his warm and kindly disposition ; in the true beating of his heart, which led him never to desert a friend or take an opponent at disadvantage ; and the courage which never failed him while prosecuting what he felt to be right. With an entire absence of self-assertion, and estimating himself less highly than was done by his friends and by the public, he inherited not a little of the masculine force and sense of his father, and was resolute both in opinion and in action. In society he was deservedly and universally popular. His varied experience of men and manners gave interest to his conversation, and his quick tact and good-breeding, and a flavour of genuine humour, coupled with his never-failing courtesy, made him a favourite everywhere. He had the true instincts and tastes of a sportsman, and all the love of open air and adventure which the character implies. Altogether he was a type of what a Scottish country gentleman should be : proud of his country, without being provincial, and preserving the thorough simplicity of his nature, while familiar with men of mark in Courts and Cabinets. In the meridian of Edinburgh, the kindly hospitality, the never-failing welcome, the frank smile, the cheerful and refined circle which are associated with his name will be long remembered ; and to the friends who recall his ready sympathy, his wise and sagacious counsel, and his generous heart, his death has left a blank which can never be filled.

He had passed his eightieth year, but until a few months before his death no one could associate old age or decay with his appearance. His carriage was as upright and his step as vigorous as they had been twenty years before. He married in 1840 a daughter of Mr. John Henry Vivian, of Singleton, Glamorganshire, who was formerly member of Parliament for Swansea. His eldest son, now Sir James Henry Gibson-Craig, was educated at Harrow and Cambridge, and is, as his father was, a member of the Scottish Bar.

ALLAN ELLIOT LOCKHART, Esq., of Borthwickbrae, Advocate, died on the 15th March, in his seventy-sixth year. He was called to the Bar in 1824, and from 1846 to 1861 he represented the county of Selkirk in Parliament. A Conservative in politics, he

was highly respected and esteemed even by those who differed from him in opinion; while his knowledge of and aptitude for county business made his presence valuable both on the bench and at various committee meetings. He was appointed a Deputy-Lieutenant of Selkirkshire in 1824, and in 1867 he obtained the Lord-Lieutenancy. He was also a Deputy-Lieutenant for the counties of Roxburgh and Lanark. The deceased gentleman married in 1830 a daughter of Sir Robert Dundas of Beechwood, who, along with a numerous family, survives him.

The Month.

Report of Committee of Faculty of Advocates on Marriage Preliminaries (Scotland) Bill, 1878.—This Bill proceeds upon the preamble that certain facilities afforded by law for the celebration of irregular marriages in Scotland are denied in the case of regular marriages, and that it is expedient, in order to encourage the celebration of regular marriages in that part of the United Kingdom, that provision should be made for the celebration of such marriages, after notice to Registrars, as is provided for by the law of England.

The leading provision of the Bill is that, after the commencement of the Act, it shall be lawful for the clergy of all denominations to celebrate marriages "either after due proclamation of banns, or after such registration of notice of an intention to marry as is hereinafter prescribed," and upon production to the clergyman either (1) of a certificate or certificates of due proclamation of banns or (2) of such registration, or (3) "of a licence of a Justice of the Peace, as hereinafter prescribed." This last alternative does not appear to be a necessary part of the Bill, and may be considered separately.

By clause 6 a Registrar's certificate of the publication of a notice of marriage is made equivalent to a certificate of the due proclamation of banns; and by clauses 7 to 10 inclusive, provision is made as to the mode of giving notice to Registrars, the method of publication, the fees chargeable for publication and certificate, the time and form of stating objections, and the procedure upon such objections as may be stated.

Clause 11 authorizes the issue of licences by Justices of the Peace "where one of the persons intending to contract marriage in Scotland is not resident in Scotland, and the other shall have obtained a Registrar's certificate in terms of this Act." Such licence is to be granted by a Justice of the Peace of the county

where the notice of the intended marriage has been given, if he shall be satisfied on inquiry, or by affidavit submitted to him along with the application, that there is no legal impediment to the marriage, and that it would be a serious inconvenience to the person who is not resident in Scotland to require him or her to reside in Scotland merely for the purpose of complying with the provisions of the Act. Such licences are made equivalent to a Registrar's certificate.

Your Committee do not consider that the preamble is objectionable, excepting in so far as it assumes that notice to Registrars, as provided, will be an effectual mode of publication. They think the proposal to allow an alternative mode of publication preferable to the abolition of banns, as proposed in the Bill of 1876. But your Committee are of opinion that notice to a Registrar, as proposed, will prove to be inadequate for the purposes of publication, seeing that all that is required to be done by the Registrar is to enter the notice in a book called the "Marriage Notice Book," and to post up on the "door or outer wall of his office" a notice in the form set forth in Schedule B of the receipt of such notice.

As it is required that objections shall be lodged with the Registrar in writing within seven days, and that an objector shall appear personally within that time to declare to the truth of his objection, it appears to the Committee that the proposed notice would not sufficiently answer the purposes for which notice is required.

Your Committee recommend as necessary, in addition, the publication at least of a notice of the proposed marriage by advertisement in a newspaper having circulation, to the satisfaction of the Registrar, in the place or district in which each of the parties has his or her ordinary residence; and a considerable majority of the Committee consider that it would be more effectual that intimation of such notice should be sent to the minister or clergyman of each place of worship in the parish in which the parties, or either of them, ordinarily reside, or the person in charge of such place of worship, in order that it may be fixed to the door thereof, or published therein, as the authorities of that church may determine.

Your Committee are further of opinion that if a Justice's licence is to be authorized when one of the parties shall have obtained a Registrar's certificate in terms of the Act, it should also be authorized when one of the parties has obtained a certificate of the proclamation of banns. The provision is intended to meet the convenience of a party not being resident in Scotland, and not being able to reside there for the requisite period without serious inconvenience, and it seems a defect in the Bill that it is not adapted to both of the alternative modes of publication.

But your Committee doubt the propriety of inserting such a provision in the Bill. They do not see any necessity for it. They also suggest that it is of questionable expediency to give the power of granting such licences to Justices of the Peace, and to

Justices of the Peace of the county in which notice has been given, viz. the county in which the other party resides. In the Bill of 1876 the power was granted only to the Registrar-General. If such a power is to be granted at all, it should be given only to some one authority who will exercise it in a systematic way, and under due precautions against its being abused. The Committee, in any view, consider it most undesirable that the duty of determining whether such a licence is to be granted should be thrown upon individual Justices.

The only other observation which your Committee think it necessary to make is upon clause 13. By this clause it is proposed to repeal "all laws, statutes, and usages, so far as they require proclamation of banns as a condition of the celebration or registration of a regular marriage, and so far as they attach any punishment or penalty to the act of contracting or witnessing a marriage without proclamation of banns." It seems to your Committee to be unnecessary and inconsistent with the leading provisions of the Bill to interfere with the ecclesiastical laws and usages relating to proclamation of banns; and it should be made clear that the clause applies only to "civil laws, statutes, and usages," or, if the repeal is to be expressed generally, that it should be limited to the repeal of laws requiring the proclamation of banns in so far as necessary to make the marriage regular according to civil law, and in so far as enacting penalties. This, of course, would leave untouched the other enactments by which marriages upon notice as provided would be held regular marriages.

On this clause (13) the Committee also suggest that further provision seems requisite as to the prosecution of the offences therein referred to. The court before which such prosecutions are to be raised ought to be specified, and the expense of the necessary prosecutions ought to be provided for.

A meeting of the Faculty of Advocates was held on 13th ult., and on consideration of the Report, the Faculty took up separately the points adverted to. The proposal to provide an alternative mode of publication was approved of. The alternative provided in the Bill was unanimously considered to be inadequate for the purposes of publication; and it was resolved to recommend that additional publication, in one or other of the modes suggested in the Report, should be required. This, of course, to be certified by the Registrar. It was further resolved, by a large majority, to disapprove of clause 11 of the Bill, in so far as it authorizes Justices of the Peace to grant licences. It was also resolved, by a large majority, that the proviso in clause 12 (that nothing in the Act should render it unlawful for a minister to refuse to celebrate a marriage on proclamation of banns) should be deleted. It was also resolved, by a majority, that clause 13 should be allowed to stand as in the Bill, excepting that more specific provision ought to be made, as suggested in the Report, for the prosecution of offences.

Public Prosecutors and Superintendents of Police.—Sheriff Hallard has addressed a letter to the Lord Provost, Magistrates, and Town Council of Edinburgh on the question—"Ought the office of Public Prosecutor in the Police Court to be disjoined from the office of Superintendent of Police?" He says:—

"The Superintendent of Police is Public Prosecutor in the Police Court. Once more there is a proposal to disjoin these offices. Once more I desire to be heard against that proposal. My long experience as a police judge relieves me, I hope, from the charge of presumption in opposing a change which, so far as the efficiency of the police is concerned, seems to me nothing less than vital. In the front I put this consideration, that, as a condition of effectual superintendence, the superintendent must be prosecutor. In every case tried in the Police Court on a plea of not guilty the policeman is a witness, more or less essential, more or less in contact with the facts under inquiry. Sometimes he merely apprehends the accused, and reports what was said or done at the moment of apprehension. Sometimes he has to tell how, pursuing a track of circumstantial evidence, he came upon the prisoner as the criminal. No doubt it would be desirable, if it were possible, for the superintendent, like the proverbial cherub, to sit aloft and watch the constable in the very act of acquitting himself of his arduous duties. When the best thing is unattainable, we must content ourselves with the second best. In this instance, the next best thing is that the superintendent should be public prosecutor. It facilitates the vigilance of the superintendent over his men to make him prosecutor. In like manner it facilitates the duties of the prosecutor to make him superintendent. The police are naturally, inevitably, the servants of the public prosecutor. The Lord Advocate is, as it were, the commander-in-chief of an army in which every policeman is a private. In courts of higher rank than the Police Court, the Advocate-Depute or the Procurator-Fiscal can act upon the police only through the superintendent or chief constable. Owing to the union of offices in the Police Court, the action to which I allude is direct, immediate, irresistible. The constables are, as it were, the very hands of the prosecutor. Much stress is sometimes laid upon the importance of drill; and her Majesty's Inspectors of Police like nothing better than to see rows of able-bodied constables in military order going through a certain amount of soldier-like evolutions with decent precision. I by no means deny the usefulness of these performances. Constables may sometimes be called upon to fulfil military duties, and must be made to understand military discipline. But, in my humble opinion, drill in their legal duties is still more essential. It is more closely connected with their daily work. The prosecutor, being also superintendent, makes his men go continually through this legal drill. He thus trains a constable to be a fit witness in any criminal trial. Here I meet an objection. This witness is liable to dismissal at the will of the prosecutor. He will therefore shape his evidence to please the prosecutor. He will best please him by ensuring a conviction. I cannot say that this objection represents any fact in my experience. But here the prosecutor is also superintendent. He has an interest in the reliability of his officers as a condition of their efficiency. That interest is something quite beyond the conviction of this particular prisoner. The witness knows this also. Indeed the two offices for the continued union of which I am pleading are so correlated and interdependent that the right fulfilment of the one continually implies and requires the right fulfilment of the other. The prosecutor has to remember his responsibilities as superintendent; the superintendent has to remember his responsibilities as prosecutor. Under the existing arrangement, of which I desire the continuance, the superintendent of police is responsible at every stage, from the moment of apprehension to the moment of conviction or acquittal. Divide the offices, and where shall you draw the line of responsi-

bility? No easy problem this, if the intention be that the new superintendent and the new prosecutor shall each be supreme in his own department, that they shall have no orders to give or take from one another. The police establishment at present is an organized body under one responsible head. I fail to see how you will improve its efficiency by splitting its head in two. The more duties a man has to fulfil, the better, up to a certain point, he will fulfil them. If that point be overpassed, the right thing to do is, not to sever the responsibility, but to increase the number of responsible subordinates. If you think it desirable, as a means of increasing the efficiency of the police, that both by night and by day—more especially by night—they should be liable to find themselves suddenly in the presence of a superior officer continually pervading the streets and thoroughfares for that purpose, I do not care to contradict you. Only I take leave to doubt whether a police needing such constant supervision can ever be very reliable; and an old saying, *Quis custodiet ipsos custodes?* rises to my recollection. But let it be granted that such an arrangement is desirable. No one man is adequate for this duty. A well-selected staff of superior officers is indispensable for this and other functions. Other functions, I say; for even the duty of prosecutor must sometimes be delegated to one of the lieutenants. There is, indeed, a mode of increasing the efficiency of the police, which is not this man's idea or that man's idea, but is the conclusion to which all who have considered the subject at all are irresistibly driven. Establish a superannuation fund. Let constables and officers who have faithfully served certain terms of years earn a right to a pension. It is pleasant to know that on this point I have scarcely a contradictor. I can claim her Majesty's Inspectors as authorities on my side. The reason of the thing is obvious. You must give good men an inducement to join the force and to remain in it. In this way they will acquire experience and skill from which every new recruit will derive benefit as well as themselves, because these things are to some extent communicable. Owing to the lack of this superannuation fund or allowance, a large proportion of the Edinburgh police are raw recruits, and some of their superior officers, now advanced in years, retain posts which would be much more efficiently filled by younger and more vigorous men.

"The most authoritative expression of opinion which I can find against the views I here maintain is in the Nineteenth Report of H. M. Inspector of Constabulary for Scotland. I quote the passage entire: 'I believe it is in contemplation to reorganize the Edinburgh police force. I am of opinion that it is most desirable that the fiscalship and the superintendentship should be separated. Any officer who has to do the duties of fiscal in the Edinburgh Police Court cannot attend to regular police work—this must devolve on subordinate officers; and I do not see why the Government grant should be paid to an officer who is principally occupied in duties which are not, strictly speaking, those of a police officer.' I do not know how much of the Government grant in favour of the Edinburgh police goes to the salary of its chief officer, but here is a pretty clear indication of opinion that this contribution ought to be withheld if the system which H. M. Inspector deems erroneous be persisted in. An opinion so expressed by one on whose report no less a sum than £11,000 per annum may be given to or withheld from the Edinburgh ratepayers, has evidently something more than mere logic to back it up, something quite beyond the reach of argument. But from that formidable allusion to the Government grant we can separate the statement, or contention rather, that 'any officer who has to do the duties of fiscal in the Edinburgh Police Court cannot attend to regular police work.' I have already suggested that the fulfilment of one duty does not necessarily imply the neglect of another. But let that pass. The opinion implied in the inspector's statement is that prosecution of offences is no part of 'regular police work.' In my ignorance, as it would seem, of sound principles, I have come to an exactly opposite conclusion. If the prosecution of offences be no part of 'regular police work,' one would like to know what 'regular police work' is. Patrol, parade, watching

on occasions when the public peace is in danger, keeping order among an unruly crowd, acting in a body against an organized tumultuary gathering—these are unquestionably police duties. It is no part of my case to pass them over. By all means let the constables have the military drill and preparation appertaining to these exceptional functions. Let these duties be cared for, but not at the cost of neglecting the rest. Would any one propose that the Royal Artillery or the Royal Engineers should be commanded, inspected, and have their efficiency reported on by military men destitute of any special knowledge of artillery or engineering? Unfortunately there is a tendency to commit a precisely analogous error in Scotland with reference to our constabulary, and that in deference to English ideas, England being a country where a public prosecutor is as yet unknown. But the principles to which I appeal necessarily go beyond these limits. I am prepared to plead for the same union of offices in the Sheriff Summary Criminal Court. The chief constable of the county ought to be the ordinary prosecutor before that tribunal. He need not on that account neglect the other duties of his office. But this additional duty would bring him in daily contact with the Procurator-Fiscal, whose assistant and subordinate he ought to be. I trust that our community will long retain the valuable services of our present superintendent, Mr. Linton (when I wrote this I was unaware of Mr. Linton's impending resignation), whom long experience as fiscal in the Police Court has, within the exigencies of that jurisdiction, made an excellent criminal lawyer. But in the event of a vacancy, I can foresee what kind of successor would be appointed to him, if the views against which I am arguing should prevail. Since London has its Colonel Henderson, why should not Edinburgh have its Major X? The military element would then be in the ascendant. Does not this mention of London recall a recent case, not without its warnings to those who wish to transplant English systems of police and procedure among ourselves? Consider for a moment its bearing on the question now in issue. In the Edinburgh police, as in all similar establishments, there are certain officers, popularly known as detectives, who are specially charged with the investigation of crime. To these men it belongs to connect together the links of a delicate chain of evidence which may lead to the discovery of a hidden criminal, an operation often requiring no mean amount of intellectual skill. Although specially selected, and therefore specially trusted, their responsibility is none the worse but all the better for the stimulus which daily and effective supervision can alone supply. By whom shall that supervision be exercised if you sever the office of prosecutor in the Police Court from the office of superintendent? Shall it be by both the chiefs to whom you propose to hand over our police establishment? Theoretically the supervision of two sounds like twice the supervision of one. Practically it means the supervision of neither. I do not know under whose immediate control were Messrs. Palmer, Druscovich, and Meiklejohn, so long as they held the position of detectives in the Metropolitan police. But I do know, as all the world knows, that they found in Mr. Linton's position here a considerable obstacle to the northern extension of their schemes. It may, I think, be justly surmised that, had the function of a public prosecutor been known in England, and had its duties in the various Police Courts been distributed among Colonel Henderson and the superior officers immediately under his orders, the temptation to conspire with malefactors to defeat the ends of justice would never have found room to grow in the minds of detective officers placed by that arrangement under constant and effective supervision. My Lord and Gentlemen, —I now sum up, in reverse order, the points which I have the honour of laying before you. Let the case of the London detectives be a warning against the proposed change. Consider the prosecution of crime as really falling within the sphere of regular police work. Numbers and pay being sufficient, if the police force be not effective, apply the remedy of a superannuation fund. Do not sever in twain the responsible head of your police establishment. Finally, I ask you to believe that it facilitates prosecution to make the prosecutor superintendent; and that it renders superintendence more effectual to make the superintendent prosecutor."

There is no doubt that the opinions of the learned Sheriff, as regards the subject of which he treats in the above letter, are entitled to the greatest weight. As a criminal judge he has seen a great deal of work, and he has the requisite ability to estimate the merits and demerits of the system at present in practice. Still it may be permitted us to doubt the correctness of the conclusions at which he has arrived. We quite agree with the expediency of establishing a superannuation fund; it would be a measure which would probably improve the state of the police force throughout the country more than anything else. But whether or not it be true, as H. M. Inspector states, that "any officer who has to do the duties of fiscal in the Edinburgh Police Court cannot attend to regular police work," we are certainly of opinion that the two offices ought not to be conjoined. We may, perhaps, hereafter discuss the matter at greater length than we have at present space to do, but meanwhile we may point out a few of the principal arguments which seem to us to militate against Sheriff Hallard's views. The Sheriff lays some stress on the importance of the constables being properly trained to give evidence, and thinks that no one is so competent and suitable to do this as the superintendent, who will also, as prosecutor, examine them at the trial. Now, without going into the question as to how far it is advisable that witnesses should be "trained" at all, we think that the interests of a superintendent and prosecutor are to some extent at variance. The system of prosecution by police officials is very prevalent in England, and, in the opinion of those who profess to know something of the matter, is considered objectionable. The Hon. A. D. Elliot, for instance, in a well-written and suggestive pamphlet which we noticed in our last number, says in reference to this practice: "The profession and attainments of a policeman are quite different from those of a prosecuting solicitor; and the performance of duty in the former capacity must disqualify him from performing satisfactorily the functions of the latter. His education and training are not of a right kind; and it is a further necessary disadvantage to his position, that of the witnesses upon whom he relies, many and important ones (the police) will always be subordinates of his own. We should never forget that it is the real profession of policemen to catch criminals, and they *must* be interested in showing that the man they have caught is the criminal. Their profession is to catch the thief, their pride to 'run him in' at the trial. The police force constitutes a very honourable profession; but in all professions notions of professional honour and etiquette grow up. Ideas that they must hold together, that their duties to each other are at least as important as their duties to the public, may prevail, as well as other notions natural enough to the very trying positions in which they are constantly put. All these are reasons for confining the police to the duties of *detecting* and *catching*, and keeping them from mixing with the trying of criminals." These remarks seem to us to

apply with much force to the point at issue. The learned Sheriff thinks that out-of-door superintendence is not so important to the constables as proper training in their "legal" duties. We are sorry to disagree with him; but while thinking that the organization of a police force should not partake too much of a military character, we are strongly of opinion that a superintendent should devote his whole time to improving the executive efficiency of his men. It is absurd to say that evidence can be better led by a police superintendent than by a properly-qualified prosecutor: surely the evidence is led in a thoroughly efficient manner in the High Court of Justiciary, where the task is committed to Advocates-Depute, who have nothing to do with the police. As regards the warning which Sheriff Hallard gives in reference to the London Detective case, we cannot see how the severance of the two offices of superintendent and prosecutor would entail less strict supervision over the detectives. On the contrary, a prosecutor who was not superintendent would have no interest in defending or palliating the faults of an inferior executive officer, but a superintendent, inasmuch as any reflection on the force is a reflection on his own efficiency, has to some extent this interest.

Sheriff Hallard's letter is no doubt a forcible and clear statement of the views he holds on the matter. They are, as we said before, entitled to much consideration, but, for the reasons above stated, we are unable to concur in them. The subject is one, however, which deserves attention, and we may recur to it on a future occasion.

Report of Committee of the Faculty of Advocates on the Criminal Law Evidence Amendment Bill.—The following Report was presented to the Faculty at a meeting held on the 13th ult. :—

"By the last section of the Bill in question it is provided that it shall not apply to Scotland, and the Committee was appointed to consider whether a similar Bill should be introduced for Scotland.

"The Committee felt that the proposed change involved one of the most important questions which have come before the Faculty, and accordingly it was very carefully considered by them.

"The third section, which provides that any prisoner or defendant shall be allowed, if he think fit, to give evidence on his own behalf, is the leading provision of the Bill; and the Committee, by a majority of one, have decided to recommend to the Faculty that the same, or a similar provision, should be applied to Scotland. The majority consists of the Dean of Faculty, Mr. Scott, Mr. Mair, Mr. Trayner, Mr. Donald Crawford, and Mr. W. C. Smith; and the minority of the Solicitor-General, the Vice-Dean Mr. Crichton, Mr. F. W. Clark, Sheriff of Lanarkshire, Mr. Hallard, and Mr. Hunter. In a matter of this kind it has been considered desirable that the views of the minority should be placed before the Faculty; and accordingly a statement of their views, drawn up by the Sheriff of Lanark, is appended to this Report.

"The majority are of opinion that the exclusion of the evidence of prisoners is the last remaining shred of a bygone system by which direct evidence was almost wholly shut out; and that after the testimony of parties, and their husbands or wives, has been admitted even in consistorial causes, its exclusion

in criminal prosecutions is an anomaly which ought not to be continued. They are satisfied that in very many cases such an exclusion leaves a painful uncertainty in the minds of the jury, and in some leads to actual injustice. Indeed, in several species of crimes—such as, *inter alia*, rape, assault, and embezzlement—it frequently puts the panel at the mercy of the principal witness; and in others—for example, theft established by recent possession—it often makes the conviction of the prisoner dependent on mere presumption. They are unable to see why a person accused of crime, and who, until proved guilty, is presumed to be innocent, should be prevented from giving evidence on a matter so nearly affecting him. They are not insensible to the danger of an unseemly wrangle occasionally arising between a too zealous judge and a prisoner, but that could not extend, as it does in French causes, beyond the special charge under trial; and they have confidence in the good sense of Scotch judges, and in the effective protection afforded against any temptation to abuse by the presence of the jury and the assistance of the prisoner's legal advisers. They can also have no doubt that if such an abuse occurred once, the comments of the public press would render a second instance extremely unlikely. It has been suggested that the prisoner is sufficiently protected by his judicial declaration, or by the right to lodge a special defence, and by himself or his counsel to make the last statement to the jury; but the special defence and the counsel's speech are not evidence in the panel's favour, and both must be founded on the proof adduced, while the declaration, even if made evidence, may be given at a point of the case when the circumstances which may require the explanation and evidence of the prisoner are not yet brought out, and when the panel, without the opportunity of advice, must, in most cases, be in a condition of confusion and mental excitement entirely unfitting him for giving a clear statement of the facts. The majority of the Committee are satisfied that the proposed change would lead to the more certain conviction of prisoners when guilty, and at the same time give additional protection to the innocent. They agree with the minority in thinking that, if it be introduced, it shall be incumbent on the prisoner who wishes to give evidence, to include his own name in his list of witnesses.

"With regard to the fourth section, which provides that a prisoner shall be allowed, if he or she think fit, to call as a witness his wife or her husband, the Committee are unanimous in recommending that the same or a similar provision should be extended to Scotland.

"The fifth section provides that where one or more prisoners are joined in the same indictment, or are together charged with the commission of the same offence, any one or more of them shall be entitled to call any other of them, or the wife or husband of any other, provided that no such prisoner shall be called against his will. The Committee, with one exception, are unanimous in favour of this provision, with the alteration (which, however, is not approved of by one or two members) that the prisoner called as a witness shall not be entitled to refuse to give evidence, but, as in divorce cases, shall not be bound to answer any question tending to criminate himself.

"The remaining clauses of the Bill are intended to carry into effect these leading provisions, and they have been considered by the Committee on the view that these pass into law.

"On this footing the Committee approve of section 6, which provides that a prisoner giving evidence for himself shall do so on oath, and subject to cross-examination; but with the alteration that no prisoner, called by another prisoner under section 5, shall be bound to answer any question tending to criminate himself; and that no prisoner shall in any case be bound to answer whether he has been charged with or has committed any other offence, but shall only be bound to answer whether he has been previously convicted.

"The Committee approve of section 7, which has reference to the procedure when the prisoner gives evidence, but with the alterations necessary to make it applicable to Scotland; and also of section 8, which enacts that nothing in the Act shall prevent the prisoner addressing the jury.

"Section 9 has reference to English criminal practice; but the Committee are of opinion that if a similar Bill is applied to Scotland, a provision should be inserted for the continuance of the system of declarations, which will, in that case, become essential for the prosecution, and they think that the prisoner should have a legal right to insist for production of his declaration, and should also be liable, in the event of his electing to give evidence, to be examined by the prosecution on what he has stated in it. A majority of the Committee are also of opinion that a prisoner should be entitled to legal advice from the moment of his apprehension.

"The Committee also approve of section 10, which declares that the failure of the prisoner to give evidence shall create no presumption against him; but they are divided upon section 11, of which the majority disapprove. The latter section makes the prisoner liable to prosecution for perjury in the event of his giving false evidence; and they consider that it may, in the case of the acquittal of the prisoner, lead to abuse on the part of the public prosecutor, while, if he is convicted, the sentence inflicted by the judge will probably be an adequate punishment. On the other hand, it is thought by those members who are in favour of the clause that the jury would pay little attention to the mere statement of a prisoner, made by him on a different footing from that of other witnesses, and without any fear of consequences in the event of untruth."

"REPORT OF MINORITY ON SECTIONS 3 AND 6.

"The provisions of sections 3 and 6 enabling a prisoner to give evidence in his own behalf on oath, and subject to cross-examination under the sanction of perjury, seems open to grave objection without any preponderating advantage. It cannot, it is thought, be validly urged, according to the theory of Scotch law, that an accused person has not an opportunity of telling his own story, or giving his own explanation of the facts as they come out in the evidence. He has an opportunity of stating anything he thinks proper in answer to the charge before he is committed for trial. And this declaration will—at least in modern practice—be laid before the jury if he desires it. Furthermore, he may lodge a special defence previous to his trial. Lastly, he is always entitled to the last speech at the conclusion of the evidence, and in that he has the most ample opportunity of clearing up, through his counsel, such ambiguities or misconceptions as might otherwise militate against him. To allow him in addition to tender himself as a witness would, it is thought, be of no advantage either to himself or to the ends of justice. A man of nervous, stupid, or feeble temperament, and labouring under the excitement of a criminal trial, might, in cross-examination, or in answering questions from the bench and the jury, be placed at a great disadvantage; and such a system might prove in this country, as it has proved elsewhere, the occasion of unseemly wrangling between the accused and his interrogators, in which that calm judicial frame of mind so essential to the ends of justice might be seriously disturbed. It is thought, however, that what is in modern practice always conceded as a privilege ought to be converted into a statutory right, and every prisoner should be entitled to demand that his declaration be laid before the jury.

"It has been suggested, that even assuming the prisoner has by the procedure above referred to an opportunity of giving his own account of what took place to the fullest extent, he labours under this disadvantage, that his statement is not made under the sanction of an oath, and therefore is not so likely to impress the jury. This appears very doubtful. When a man is tried on a serious charge, if he be really innocent he will, in all probability, tell the truth whether on oath or not. If, again, he is really guilty, he will not, in all probability, hesitate to add the guilt of perjury to his original offence. Before, therefore, it could be known what weight was to be attributed to the oath of an accused person, it would be necessary to ascertain whether he was innocent or guilty of the charge on which he was being tried—a procedure which looks very much like reasoning in a circle. Nor does the provision that, though acquitted

of the crime charged, he may afterwards be indicted for perjury, seem greatly to mend the matter. If tried by the same jury and on the same evidence, he would necessarily obtain an acquittal. To import additional evidence with the new trial, or to submit it to a new jury, would practically involve a retrial of the original offence. And this, for many reasons, would be most undesirable.

"One great and obvious objection to allowing prisoners to tender themselves as witnesses in their own defence, is the presumption that would thereby be created against such as did not avail themselves of this option. Section 10 endeavours to guard against this, by providing that failure to give evidence shall not create such a presumption. It does not, however, seem possible to counteract by any statutory enactment the force of a presumption which naturally suggests itself to the untrained minds of a jury. The only benefit of the provision would be that the judge would be bound to tell the jury that they must dismiss any such presumption from their minds.

"If it should ever become law in Scotland that an accused person might tender himself as a witness at his own trial, it would seem absolutely necessary in the interests of justice that he should be liable to be confronted with the declaration already emitted. As the accused could only be examined among the witnesses for the defence, and as he would probably only call himself as the last of his own witnesses, he would otherwise have an opportunity of making a plausible statement at the close of the case, which the prosecutor would have no means of refuting."

At a meeting of Faculty held on the 15th ult. to consider the above Report, it was moved by Mr. R. V. Campbell, and seconded by Mr. Black, that the law should be altered so as to allow persons who are accused of crime to be competent though not compulsory witnesses. The Solicitor-General moved as an amendment that no alteration be made in the law on this matter, which was seconded by Mr. Guthrie-Smith. On a division the motion was carried by 23 to 17. Mr. M'Laren moved as an addition to Mr. Campbell's motion that it should be competent to examine a prisoner as a witness on the motion of the prosecutor, which motion, being seconded by Mr. Taylor Innes, was carried by 16 to 8.

At a meeting of Faculty held on 19th ult. the Dean read two letters which he had received from the Hon. E. Ashley and the Right Hon. Gurney, who had charge of the Criminal Law Evidence Amendment Bill. They stated that the Bill had been read a second time, and had been referred to a Select Committee, which would not, however, sit till after Easter. They also expressed their opinion that the Committee would gladly receive any communication or evidence as to the expediency of extending the principle of the measure to Scotland. The Faculty then agreed to the re-appointment of the Committee, with instructions to take such measures as they think right, with the view of carrying out the resolution which was come to at the meeting of the 15th.

Sheriffs and Sheriffs-Substituta.—We refer to our reports of Sheriff-Court cases for a curious case of refusal by a Sheriff-Substitute to take up and dispose of a case in which the Court of Session had dismissed an appeal in an unfinished litigation without expressly remitting the case back to him. The Sheriff

had to intervene to prevent a denial of justice to the litigant who held a finding of expenses in his favour, but was not allowed to proceed to recover them. In connection with the Sheriff's remark in his note, that "fortunately our legal machinery is quite adequate to provide a remedy for this unexampled state of matters," we may just allude to the introduction of a Bill in this session of Parliament "to Amend the Law relating to the Jurisdiction of the County Courts" of England by the formation of principal county judges, under whom the present county judges are to act as subsidiary county judges. It would thus seem that England has felt the necessity for and is about to borrow from Scotland a principal county judge as well as the subsidiary one which Lord Brougham got them some years ago on the Scotch model. This, as well as such circumstances as have occurred in the Sheriff-Court case alluded to, will tend to prevent a renewal of the agitation which was some time ago attempted in favour of the abolition of the double office in Scotland.

Discontinuance of Prisons.—Under the Prisons (Scotland) Act, 1877, the Secretary of State has issued a rule substituting certain prisons instead of others which are to be discontinued. The following is the list of both the substituted and discontinued prisons:—

Prisons to be discontinued.

Banff	.	.	.
Kirkintilloch	}	.	.
Helensburgh		.	.
Dunbar	.	.	.
Stonehaven	.	.	.
Kinross	.	.	.
Nairn	.	.	.
Peebles	.	.	.
Pollockshaws	.	.	.
Tain	.	.	.
Hawick	}	.	.
Kelso		.	.
Wigtown	.	.	.

Prisons appointed.

Elgin.
Dumbarton.
Haddington.
Aberdeen.
Alloa.
Inverness.
Edinburgh.
Paisley.
Dingwall.
Jedburgh.
Stranraer.

SPRING VACATION ARRANGEMENTS.

Circuits.—By the time this *Magazine* is in the hands of our readers most of the assizes will have been already held, as the majority of them take place in March. The following are the fixtures for April:—

NORTH.—Lord JUSTICE-CLERK and Lord YOUNG.

Inverness—Tuesday, 2nd April, 11 o'clock.

JOHN BURNET, Esq., Advocate-Depute.

ÆNEAS MACBEAN, Clerk.

WEST.—Lord DEAS and MURE

Glasgow—Monday, 22nd April, 12.30 o'clock.

Stirling—Monday, 29th April, 11 "

Inverary—Wednesday, 8th May, 11 "

ROGER MONTGOMERIE, Esq., Advocate-Depute.

W. HAMILTON BELL, Clerk.

SOUTH.—Lords CRAIGHILL and ADAM.

Jedburgh—Tuesday, 2nd April.

ALEXANDER BLAIR, Esq., Advocate-Depute.

J. M. M'COSH, Clerk.

Box-Days.—The Lords have appointed Tuesday, 4th, and Wednesday, 24th April to be the box-days in the Spring Vacations.

Motion-Days.—The Lord Ordinary on the Bills will sit in Court on Wednesday 10th and Tuesday 30th April each day at 11 o'clock, for the disposal of motions and other business falling under the 93rd section of the Court of Session Act, 1868, and rolls will be taken up on Monday 8th and Saturday 27th April.

Bill Chamber Rotation of Judges.—The following is the Bill Chamber Roster for the Spring Vacation:—

Thursday, 21st March, to Saturday, 6th April, Lord ORMDALE.

Monday, 8th April, to Saturday, 20th April, Lord GIFFORD.

Monday, 22nd April, to Saturday, 4th May, Lord SHAND.

Monday, 6th May, to Saturday, 11th May, Lord RUTHERFURD CLARK.

The Scottish Law Magazine and Sheriff Court Reporter.**SHERIFF COURT OF CAITHNESS.**

Sheriffs RUSSELL and THOMAS.

NICOLSONS v. THOMSON.

This was a petition for interdict of a sale of poinded effects, on the ground that they belonged to the petitioners, who were the debtor's sons, and not to their father, the debtor. They all resided in family together on a farm, of which the father was tenant according to the valuation roll, and for which he paid the taxes. The Sheriff-Substitute (Russell) granted interdict as craved, and the Sheriff (Thoms) reversed with expenses, and on appeal to the Court of Session (Second Division) the Sheriff's judgment was affirmed. The appeal was dismissed with expenses in the Court of Session, which were taxed and decerned for in the Court of Session. The successful defender extracted this decree in order to recover the Court of Session expenses, and thereafter got the expenses awarded to him by the Sheriff taxed by the auditor of the Sheriff Court under the remit in the Sheriff's interlocutor. He then enrolled the case before the Sheriff-Substitute to have the expenses so taxed decerned in the Sheriff Court. The further procedure appears from the following minutes and interlocutors:—

"*Wick, 26th February 1878.*—Miller, for respondent, produced extract decree of the Lords of Council and Session dismissing petitioners' appeal, and craved his Lordship to grant decree for the expenses in this court as taxed by the auditor conform to Account No. 26 of process. **WILLIAM MILLER.**"

"5th March 1878.—In respect the Sheriff-Substitute declines to write or to decern for the expenses as craved in the foregoing minute, the defender moves his Lordship the Sheriff to dispose of the minute.

DAVID CORMACK, *Pror.*"

"Wick, 9th March 1878.—The Sheriff appoints evidence of intimation of the above motion to the petitioners to be put into process, and the petitioners if they have objections to the motion, to minute these within three days of the date of this interlocutor.

GEO. H. THOMS."

Under this order the petitioners lodged this minute :—

"Wick, 12th March 1878.—The petitioners object to the defender's motions of 26th February and 5th March 1878 for the following reasons :—

"1. Because the process has been removed from the jurisdiction of the Sheriff Court by the petitioners' appeal to the Second Division of the Court of Session, 11th August 1877, of this date.

"2. Because the Court of Session have disposed of the appeal *in toto*, and did not remit the process back to the Sheriff Court.

"3. Because the defender has extracted the decree of the Court of Session, and the process is thus for ever at an end, and taken out of Court. (See *Rothsay v. Macneil*, 17th December 1789, M. 12,188).

"The petitioners stated these objections when the defender's motion was before the Sheriff-Substitute, and respectfully crave the expenses then and now incurred.—In respect whereof, etc.,

R. S. W. LEITH.

The Sheriff then disposed of the case :—

"Wick, 18th March 1878.—The Sheriff having considered the defender's motion (evidenced as intimated), and the petitioners' objections thereto, repels these objections, approves of the auditor's report on expenses No. 26 of process, and in terms thereof decerns against the petitioners for £10, 10s. 11d. as the taxed amount of expenses due to the defender, together with £1, 1s. as the amount of expenses hereby modified as the expenses incurred by the defender since 9th February 1878.

GEO. H. THOMS.

"*Note.*—The minute No 31 of process sets forth that 'the petitioners stated the objections disposed of by this interlocutor when the defender's motion was before the Sheriff-Substitute.' Instead, however, of these objections having been disposed of when so stated, the defender has minuted (and thus corroborated the petitioner's statement) that the 'Sheriff-Substitute declines to write or to decern for the expenses, and that although the Court of Session had affirmed the Sheriff's finding that these expenses were due and payable by the petitioners.' Hence it is that the Sheriff has had to interfere to effect the administration of justice between the litigants. Fortunately our legal machinery is quite adequate to provide a remedy for this unexampled state of matters. The dismissal of an appeal, and affirmance of the interlocutor submitted to review, whether by the Supreme Court or the Sheriff *ipso facto*, sends the case back to be proceeded with. The Sheriff-Substitute has never refused to act on this view in appeals disposed of by the Sheriff, and it is hoped that he will in future, like all the other Sheriff-Substitutes in Scotland, take up and dispose of cases of appeal to the Supreme Court in the same way. Extract of the judgment dismissing the appeal does not affect the matter, as otherwise extract of any interim decerniture even by a Sheriff in a cause would prevent the further prosecution of an action. Such a denial of justice can receive no sanction.

"In respect of the opposition of the petitioners, which is evidenced by their minute, and which led to the discussion before the Sheriff-Substitute, the Sheriff has found them liable in additional expenses, and to terminate this litigation the Sheriff has modified these at the sum now decerned for.

G. H. T."

SHERIFF COURT OF LANARKSHIRE.

Sheriffs CLARK and LEES.

WOODS v. G. AND J. BURNS.

Carrier—Through-Contract—Reparation.—In this action the pursuer claimed damages from the defenders for injuries received by his goods while in course of transit, and in the custody of the defenders as sub-contractors for the Ulster Railway Company. The circumstances are fully detailed in the Sheriff's note. The Sheriff-Substitute found (1) that the contracts for the carriage of the goods libelled on, being through-contracts, and having been made with the first carriers of the said goods, and not with the defenders, who were the ultimate carriers thereof, the pursuer is not entitled to insist in an action for the recovery of damages from the defenders for any injuries the said goods may have received in the course of carriage by them, unless liability therefor (to such extent as may be proved) be admitted; and (2) that such admission is withheld: he accordingly assoltized the defenders with expenses. In a note he at some length examined the various pleas put forward by the pursuer, and pointed out that "in the whole annals of Scotch law there is not a single authoritative decision and not one dictum to the effect that such a right of action exists." "In the English courts the question has been raised, and it has been conclusively settled by the House of Lords that the English law denies any such right of action. Now unless our law as to carriers differs from that of England so materially as to justify a decision on a Scotch case to the opposite effect, I cannot see any grounds for believing that, on a point in regard to which our law-books are mute, the House of Lords would sanction an opposite rule in Scotland from that which they have prescribed for England."

On appeal the Sheriff adhered to the judgment on the merits, but found neither party entitled to expenses. In his note he says:—

"The goods in question were consigned from the interior of Ireland to the pursuer at Glasgow. The transit was partly by railway and partly by sea from Belfast. A through-contract was made by the consigner with an Irish railway company to carry the goods to Glasgow, at which place is the consignee's place of business. The defenders were the sub-carriers or sub-agents of the said railway company to perform that part of the transit which lay between Belfast and Glasgow. On arrival at Glasgow the goods were found to be in bad order, and the pursuer, the consignee, refused to take delivery or pay the freight of the transit unless the defenders, through their carters, would sign to the effect that the goods were pilfered, injured, and damaged. To this the carters agreed, and signed to that effect. The pursuer then received the goods, and paid the whole freight, not only that part which belonged to the transit from Belfast, but that part also which had to do with the transit by railway in Ireland. It is in these circumstances that he brings the present action, not against the Irish railway company, but against the defenders. In defence it is pleaded that the defenders being only second carriers or sub-carriers, no contract existed between them and the pursuer, and therefore they are not liable in any action at his instance. Now in the first place I think it is proved that a through-contract was made between the consigner of the goods and the Irish railway company, whereby the latter undertook the conveyance to Glasgow. This contract was certainly not made with the pursuer, the consignee, directly. But as in contemplation of law the consignor is in such circumstances the agent of the consignee, it follows that a contract was *de facto* made on the part of the consignee, by which he had a right of action against the railway company in the event of damage arising to his goods in any part of the transit. From this it follows that if the goods in the present case did receive injury in any part of the transit, an action would lie

at the pursuer's instance against the Irish company; nor does Shaw, the manager of that company, call this matter in question. The real point, however, to be determined in the present case is not whether the Irish company may not be liable, but whether the defenders are not also responsible, and may not be proceeded against directly. Now in support of this latter proposition it is argued by the pursuer that the goods in question were *de facto* pilfered or injured in the custody of the defenders, i.e. on the passage between Belfast and Glasgow, and therefore that they, as the direct wrongdoers, are liable for the consequences of their own fault. This involves matter of both fact and law, and in so far as the law is concerned, it is of vast importance to a commercial community to have that clearly understood. Still I should not have deemed it my duty to decide the point of law unless it had been fairly raised in the present case—more especially as it has not, so far as I can discover, been authoritatively settled in the Supreme Court of Scotland.

"It seems to me, however, after a very careful perusal of the evidence on two or three different occasions, that the damage, at least in all its main features, did take place while the goods were in transit in the defenders' steamer. The pure question of law therefore emerges, and it may be formulated thus: When a through-contract exists with a carrier or company of carriers for conveying goods from one given place to another beyond their own line or system, and they are therefore necessitated to employ a second carrier or carriers, and the goods get damaged while in the custody of these second carriers, does an action lie against the latter, or is it confined to the first carrier only, viz. those with whom the contract was made?

"It is probably unnecessary to state, what is admitted on all hands, that in the law of England a long tract of decisions has definitely decided that the action in such circumstances lies against the first and contracting carrier alone. But, as I have already remarked, there appears to be no ruling decision in the Supreme Courts of Scotland directly dealing with the matter. We are therefore thrown back upon general legal principle; and no doubt the law of England is entitled to the greatest regard in a mercantile question of this kind, unless it can be shown that it is the outcome of principles not recognised in the law of Scotland. A good deal was said on both sides as to the supposed convenience of the rule both on the one side and the other. It was argued that where a consignee can establish that his goods were injured while in the custody of the last carrier who is amenable to the jurisdiction of the Scottish courts, it is very hard that he should be compelled to seek his remedy from a foreign tribunal, placed it may be at a great distance, and in order to put which in operation much trouble and expense must necessarily be incurred. No doubt there is a good deal in this view, but a great deal may also be said with equal force on the other side. It might be said that it would be very hard on a Scotch carrier—the last of a series—to be compelled to answer at the suit of a man with whom he held no direct contract, and to seek his relief or indemnity against a foreigner, between whom, it may be, and the consignee or owner of the goods there exist certain equities or certain specialties of contract which, if they were only known and ascertained, might form a sufficient answer to the action. In point of fact all reasoning from mere supposed grounds of equity would probably in a matter of this kind be fallacious. It seems, therefore, that in dealing with such a question, recourse must be had to what may be called generally-received principles of law. Now it seems to me that the grounds upon which the English courts have based their ruling in cases of this kind are clear and simple, and unless for some statutory provision to the contrary, must be given effect to under every system of law. The ground of liability which they recognise is '*privity of contract*,' that is to say, contract either express or implied between the owner of the goods and the carrier. In the case of a through-carrier this ground is clear, the ground of liability in such a case being the contract of bailment or carriage which has been specially made. But it is difficult to see on what grounds liability in the case supposed can be held to be established against subsequent

carriers. These are the agents or sub-carriers, not of the consignee, but of the contracting carrier, and to him they are responsible. In the case supposed there is no contract between them and the consignee or owner of the goods. In fact, so far as they are concerned, the person entitled to call them to account is not the owner, but the carrier or company from whom they have received them, and with whom they have made the contract. It may be said, however, that this principle, clear as it is, is unsound, because if carried out it would prove too much, and would negative the maxim, *Culpa tenet suos auctores*. The answer to that however is, I think, twofold. In the first place, the wrongdoing carrier does not get freed of his obligations, the only effect being that he has to account to the first carrier instead of to the consignee; secondly, a distinction is to be taken—and it seems to me a very broad one—between cases where damage arises from mere negligence or unfitness for discharge of the duty undertaken, and cases in which the damage is caused by wilful and malicious mischief on the part of the second carrier. When that last element is established a new ground of liability altogether emerges, and it is to a case such as that that the maxim above quoted seems to apply.

"Two cases are continually referred to in the Glasgow Small Debt Court as ruling the question adversely to the views I have mentioned. One of these cases—*Cormack v. The Edinburgh and Glasgow Railway Co.*—was decided on 27th August 1860, by the late Sheriff-Substitute Strathern, in a most elaborate judgment, which will be found in the 'Scottish Law Journal,' vol. ii. p. 112. In that case he held that where there was a through-contract, and loss arose to the consignee in consequence of fault on the part of the second railway company, he had his option of bringing his action either against the direct wrong-doer or the party with whom the contract of carriage had been made. The same view was taken by Mr. Strathern in the subsequent case—*Buchanan v. The Edinburgh and Glasgow Railway Co.* (Sept. 25, 1860)—and adhered to on appeal by the late Sir Archibald Alison. See 'Scottish Law Reporter,' vol. ii. p. 123. On a first perusal of these decisions, and before I had had my attention specially directed to the subject, I was strongly impressed with what seemed to me the conclusiveness of the grounds upon which they were rested; but on reconsideration I have come to be of opinion that both these decisions proceeded on the fallacy of assuming that the same principles obtain whether the loss or damage was caused by direct malicious acts and delicts, and which would ground criminal proceedings, or whether they arose from such carelessness or negligence as amounted to a mere breach of contract. I think this error runs through the whole of the argument, and I do not see that either of these judges have succeeded in showing that there is any distinction in the ground-principles of the laws of England and Scotland, in so far as they regulate the matter in question. There is another case also frequently referred to, because it formed the subject of appeal to the Supreme Court—the case of *Ferguson, Rennie, & Co. v. The Scottish Central Railway Co.* (March 30, 1863, 35 Jurist, 440). That case also originated in this Court, and the Sheriff-Substitute was inclined to assume, though somewhat doubtfully, that the English rule should be given effect to because it was not to be presumed that the two laws should display so great a difference in a matter of this kind. On appeal, however, the Sheriff repelled the defences so far as preliminary, and before answer allowed a proof. The case was then taken by advocacy to the Court of Session, but the First Division of that Court, in dealing with the case, waived deciding the pure question of whether the consignee had right of action against the last railway company in whose hands the goods were found, and based their judgment on the ground that the action being one for delivery, and not for damages, there could be no doubt that by the law of Scotland the Sheriff, as Judge Ordinary of the bounds, was entitled to order delivery to the proper owner by those illegally detaining the articles. This case cannot therefore be cited as one in point. Some confusion seems to have been introduced in some of these Sheriff Court judgments by allusions to the edict *nautæ, cauponæ, stabularii*. But I think it is easy to show that in a case such as the present the edict has

no direct application. The point is not whether one contravening the edict is or is not responsible, but to whom is he responsible. And I take it that even under the Roman law he would have been held answerable to the party with whom he had contracted, and not to another of whom he might know nothing.

"So far, therefore, as this part of the case goes, I think the Sheriff-Substitute is sound in his holding that the English law must be held to be the law of Scotland.

"It must not be supposed, however, that this is the only element in the present case requiring consideration. As I have already observed, the obligation is one *ex contractu* either express or implied, and if, therefore, it can be shown that the last carrier has by such contract accepted liability, there can be no doubt, I think, that both by the laws of England and Scotland he will be liable to have the action directed against him. There is nothing, for instance, to prevent the last carrier from signing a document to the effect that he agrees to make good any loss or damage which the goods may be proved to have sustained at the time they are delivered; and I have no doubt that if the defenders had signed such a document in the present case, they would be liable to the pursuer, whatever contract might have been entered into by the original carrier. The principle upon which this doctrine rests is recognised in the English case of *Coxen v. The Great Western Railway Co.*, 10th Feb. 1860, 29 L. J. Exch. 165; and indeed it is nothing else than the logical consequence of the English doctrine that liability in cases like the present rests upon contract. Nor do I think that such a contract must necessarily be in writing, but may be proved by parole evidence. Now in the present case it was argued by the pursuer that the defenders, by their actings and the documents signed on their behalf, must be held to have accepted liability for the state of the goods at the time they were tendered to the consignee. The question therefore remains, Is there anything in the evidence to show conclusively that such a contract, express or implied, was entered into on the part of the defenders? After a very careful perusal of the proof, which is certainly on this point far from satisfactory, I have come to be of opinion that there is not sufficient to show that such contract was *de facto* entered into, though I have no doubt that the conduct of the defenders went far to lead the pursuer to believe that they had accepted a liability of this kind. It is proved that the defenders, through the carters, signed the papers in process by which they acknowledge the goods to be pilfered or injured. But this is not necessarily conclusive, because the defenders in signing such documents may be held in law as acting for the Irish railway company, whose sub-agents they were, and in that view they were binding not themselves but their employers. It may be fairly contended, indeed, that just as the carters when they signed their receipts were binding not themselves but the defenders, so the defenders, in so far as they were concerned, were binding not themselves but their employers, the Irish company. It would therefore require some very clear undertaking to get rid of this presumption, and show that the defenders intended to accept responsibility on their own account. It is also true that the defenders took payment, not of their own freight merely, but of that payable to the Irish railway company; but here again it may be argued that they were acting merely as agents for the latter, just as their servants in taking such payments were acting not for themselves but for the defenders. Furthermore, it is no doubt proved that the defenders had previously settled similar claims made by the pursuer. But here again there is not sufficient evidence to show that in doing so they were acting for themselves, and not for the Irish company whom they represent.

"Upon these grounds, therefore, I have come to be of opinion that the pursuer has failed in making out a clear case against the defenders on any of the grounds relied on; but keeping in view the conduct of the defenders, by which no doubt the pursuer was to a considerable extent misled, I am of opinion that no expenses should be found due to either side."

Act.—T. C. Young & Son.—Alt.—G. B. Young.

Sheriff LEES.

M'LAUGHLIN v. LEWIS POTTER & CO.

Carrier—Contract—Delivery.—The defenders, who are steamship-owners in Glasgow, received at Dublin certain goods consigned from the interior of Ireland to the pursuer at Glasgow. The railway company who made the contract only undertook the carriage of them to Dublin, though the address they bore was Glasgow. The pursuer alleged the defenders had got the goods but had not delivered them. The Sheriff-Substitute allowed the pursuer a proof of his averments, repelling the defenders' pleas. He observed in his note :—

"It is not disputed by the pursuer that if the present case comes under the authority of *Woods v. Burns* it must be dismissed. But he contends, and I think rightly, that the case does not fall under the rule there laid down. The consignment-note is before me, and in it the Midland Great Western Railway Company acknowledge that they received the box in question; that the pursuer is the consignee; and that the destination of the box is Glasgow; and that they 'promise to deliver [the goods] at N'wall' (Northwall). Here, therefore, the railway made not a through-contract, but one under which they were to make delivery of the goods at Northwall; and there, therefore, their obligations in regard to them under the contract ended. Hence, on such delivery, the risk of the goods passed from them and lay with the parties whom the pursuer had selected as his agents, or who took delivery of the goods for him. Now, in the statement of the defender on record, it is 'admitted that the two boxes were consigned to the pursuer at Dublin, to be forwarded to their destination at the pursuer's address in Glasgow by the defenders.' This, especially in the light of the consignment-receipt, I can only read as meaning that the defenders, by express or implied contract with the pursuer, took delivery for him of his goods at Northwall; and therefore, in respect of that contract, the pursuer has a right of action against them. The separate freight-note has, I think, no material bearing on the case. In short, I read the contract made by the consignor in Ireland on behalf of the pursuer as a contract which terminated by delivery of the goods to the pursuer or his representatives at Northwall, Dublin, and that for any injuries subsequently received by the goods the defenders are liable to the pursuer as parties to a separate contract with him. Somebody must necessarily have taken delivery of the goods for the pursuer, and the defenders admit they did. This is the view taken in the English courts; and the case of *Forbes v. The Great Western Railway Company* (22 L. J. Exch. 76) will be found closely in point."

The decision was acquiesced in.

Act.—*M'Lachlan.*—*Alt.*—*Watt.*

Notes of English, American, and Colonial Cases.

BILL OF EXCHANGE.—*Claim by drawer against acceptor—Re-exchange.*—When a bill of exchange is dishonoured at maturity, the drawer of the bill is entitled to recover, as against the acceptor, not only the amount of the bill, and interest and notarial and telegraphic charges, but also the re-exchange. *Woolsey v. Crawford* (2 Camp. 445) and *Napier v. Schneider* (12 East 420) treated as overruled.—*Re The General South American Co. (Lim.)*, 47 L. J. Rep. Ch. 67.

COPYRIGHT.—Registration.—International Copyright Act.—An opera was composed by O. and represented in France, and a pianoforte arrangement by S. was published immediately afterwards. In registering the opera under the International Copyright Act, the name of the opera and of its composer, and the correct date of its first representation, were given, but in addition, the date of the publication of the pianoforte arrangement, in which no copyright was claimed, was given, and that arrangement was deposited at the time of registration, but not the score of the opera itself, which was not printed :—*Held*, reversing the decision of one of the Vice-Chancellors, that the registration was sufficient to protect the opera in England. *Held* also, that the validity of the registration was not affected by the addition of the date or by the deposit of the pianoforte arrangement.—*Boosey v. Fairlie* (App.), 47 L. J. Rep. Ch. 186.

LIGHTS.—Fishing-smack not attached to net.—It is the duty of those on board a fishing-smack, even though they are just about to let go the nets, to exhibit their side lights if the smack is under way.—*The Englishman*, 47 L. J. Rep. P. D. & A. 9. A fishing-smack was found to blame for not having the proper lights exhibited, but the neglect did not contribute to the collision, which was solely caused by the want of a proper lookout on board the other ship :—*Held*, that the owners of the fishing-smack were entitled to recover.—*Ibid*.

EMBEZZLEMENT.—Wild rabbits—Property in animals *feræ naturæ*.—The prisoner being employed as a gamekeeper, and having no authority to kill rabbits for his own use, killed and removed wild rabbits in and from a wood belonging to his master with the intention of selling them. The killing, removing, and selling were one continuous act :—*Held*, that the prisoner was not guilty of embezzlement.—*R. v. Read* (C.C.R.), 47 L. J. Rep. M.C. 50.

SUCCESSION DUTY.—Settlement by a female British subject on marriage with a foreigner—Trust funds invested in foreign securities—Foreign children.—By a settlement, made on the marriage of a female British subject with a foreigner, a sum of 3 per cent. Rentes, and some shares in the Bank of France, the property of the wife, were vested in trustees, three of whom were British subjects. The husband and wife, in exercise of a power contained in the settlement, appointed the trust funds, subject to their own life interests, amongst their children, who were domiciled foreigners. Both parents having died,—*Held*, that the funds were liable to the payment of succession duty.—*In re Cigala's Settlement*, 47 L. J. Rep. Ch. 166.

LANDLORD AND TENANT.—Fixtures—Leave to remove—Surrender of lease—Removal within reasonable time.—Defendant was lessor of certain premises, of which Jackson was tenant under a lease for fourteen years, from April 2, 1876. During his tenancy Jackson erected a greenhouse, the defendant undertaking to allow him to remove the same. The greenhouse was so affixed to the soil that it would not, in the absence of agreement, have been removable. Subsequently Jackson granted a bill of sale to H., whereby he assigned, amongst other things, "all the greenhouses on the premises," and gave the assignee power to enter and sell the same. H. having entered on April 4, 1877, the greenhouse was advertised for sale at an auction of Jackson's chattels, held on May 4, but not then bought. After the auction the plaintiff made an offer for the greenhouse, which was accepted on June 7. In the meantime the auctioneer, who had been in possession for H. under the bill of sale, and kept the keys of the premises, had, on May 11, sent the keys to the defendant, and on May 14 the defendant had taken possession. On June 7 notice was sent to the defendant of the sale to the plaintiff, and that the purchaser was about to remove the greenhouse. The defendant having denied the plaintiff's right to remove,—*Held*, that a surrender of the term had taken place on May 14, that no claim to remove was made within a reasonable time after, and that therefore the greenhouse was not removable by the plaintiff.—*Moss v. James*, 47 L. J. Rep. Q.B. 160.

MINE.—*Liability to fence shaft of abandoned mine—Owner—Person interested in minerals.*—By section 13 of the Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), "the owner" and "every other person interested in the minerals" of an abandoned mine, are required to fence the shaft, for the prevention of accidents; and section 41 enacts that the term "owner means any person or body corporate, who is the immediate proprietor or lessee, or occupier" of the mine and "does not include a person or body corporate, who merely receives a royalty, rent, or fine from a mine, or is merely the proprietor of a mine, subject to any lease, grant, or license for the making thereof, or is merely the owner of the soil, and not interested in the minerals." The owners in fee of a mine granted a lease for a term of years, reserving to themselves a royalty on the minerals produced, with a power to distrain for the rent, and to detain the minerals gotten until the royalty was paid :—*Held*, that such lessors were, during the existence of the lease, persons interested in the minerals, within the meaning of the said 13th section, and were therefore liable, in the event of the mine becoming an abandoned mine, to cause its shaft to be fenced for the prevention of accidents. *Evans v. Mostyn*, 47 L. J. Rep. M. C. 25.

WINDING UP.—*Unregistered company—Limited and unlimited assets—Policyholders—General creditors—Contributories—Application of sums received by way of compromise.*—By the deed of settlement of an unregistered life assurance company it was provided that the liability of the shareholders in respect of policies should be limited to the subscribed capital. At the time of the winding up of the society, which happened in 1869, £9 per share of the subscribed capital remained uncalled up, and in 1870 a call of this £9 per share was made. In 1873 a further call of £12 per share was made, it having been ascertained that a call to that amount would, with the £9 per share, pay the debts of the society. Compromises were entered into by the liquidator with certain of the contributories who were unable to pay the calls in full :—*Held*, that where the compromise was for £9 per share or less, the whole of the sum received by way of compromise was to be carried to the account of policyholders, and that where the sum received by way of compromise amounted to more than £9 per share, then a sum equivalent to £9 per share was to be carried to the account of the policyholders, and the residue was to be applied to the payment of the general creditors of the society. *In re the International Life Assurance Society*, 47 L. J. Rep. Ch. 88.

WILL.—*Description—Error in name—parole evidence.*—Testator gave a legacy to the children of his daughter by any husband other than "Mr. Thomas Fisher, of Bridge Street, Bath." At the date of the will there lived in Bridge Street, Thomas Fisher, a married man, with a grown-up son, Henry Tom Fisher, who, when at Bath, lived at his father's house :—*Held*, that there being two persons substantially answering the same description, parole evidence was admissible to show which of the two was intended; and that, on the evidence, the son was clearly the person intended.—*Re the Woolvorton Mortgaged Estates*. 47 L. J. Rep. Ch. 127.

COMPULSORY PILOTAGE.—*Contributory negligence—onus of proof.*—A collision took place between two vessels, and the defendants admitted that their vessel was to blame, but alleged by way of defence that they had a pilot on board by compulsion of law, and that they were therefore exempt from liability :—*Held* (reversing the decision of the Judge of the Admiralty Court), that as there was no evidence of contributory negligence on the part of the defendant owners, they were exempt from liability.—*Clyde Navigation Company v. Barclay* followed.—*The Dairo* (App.), 47 L. J. Rep. P. D. & A. The defendants having applied on a subsequent occasion for the costs of the action :—*Held*, that the rule of the Court of Admiralty, that, where the defendants succeed on a plea of compulsory pilotage, no costs are to be given, also holds good in the Court of Appeal. *The Schwan* (43 L. J. Rep. Ad. 18; s. c. Law Rep. 4 Ad. & E. 187) followed.—*Ibid*.

THE JOURNAL OF JURISPRUDENCE.

THE ROMAN CATHOLIC HIERARCHY AND THE STATUTES OF 1560.

"LEO, servant of the servants of God," on the 4th March 1878, issued, *in perpetuam rei memoriam*, Letters Apostolic restoring a Roman Catholic Hierarchy in Scotland. These letters will be known among Papal documents of the kind by their first words, as *Ex summo Apostolatus apice*, a phrase expressive of that summit of central authority from which he and his predecessor, looking down over Europe, discerned and provided for the desolate condition of Scotland. Pope Pius, by the way, bulks largely in this document, but merely historically, and by way of narrating what he had hoped and "determined" to do. The whole acts of "erection, constitution, restitution, institution, assignation, adjection, attribution, decree, mandate, and will" are done together and at once, and "*motu proprio*," by the present Monarch of the Church.

There is one clause in this document to which we do not intend to refer in detail, though it has much historical interest—that which provides that the new hierarchy shall enjoy the rights and faculties of other bishops throughout the world, and shall be bound by the same obligations, "in virtue of the same common and general discipline of the Church." How far this common discipline, as defined by the recent Council, makes the bishops the mere dependents of the Pope, and how far this reverses the position of independence held or claimed by the ancient hierarchy of Scotland, is a very interesting question. What is clear on the face of the document is, that such ancient independence cannot be pleaded as giving henceforth any exceptional position. For "whatever may have been in force, either on account of the ancient condition of the Scottish Church, or from peculiar constitutions adapted to the subsequent condition of the missions, or from particular privileges and customs, the circumstances being now changed, shall carry no right and no obligation. And to the end that in this matter no doubt may hereafter arise, we, in the plenitude of our apostolic

authority, take away all force of obligation and of right from those peculiar statutes, ordinaries, and privileges of every kind, and from customs, though handed down and prevailing from the most ancient and immemorial time."

There is another clause, however, in the letters in which we are at present more interested: it is that in which the resolution for immediate restoration is grounded—first, upon the growth of the Catholic religion in Scotland; and, secondly, upon the consideration "that, by the freedom which the illustrious British Government extends to Catholics, any impediment is removed which might have prevented the restoration of the regular government of a sacred hierarchy among the Scots." The head of our present Government has always been supposed to lean somewhat to the side of having diplomatic relations with the spiritual sovereign of the Tiber, and the present Pope has already shown an anxiety to meet us in a friendly way. But there is no reason to suppose that any exceptional freedom, or indeed any administrative toleration, or act of the Government proper, is here intended. It is the state of *the law* in Great Britain in this matter which is pointed at. We do not in this paper intend to discuss whether every legal "impediment is removed." We shall take it for granted, for the sake of argument, that the Act 9 & 10 Vict. c. 59, relieves Roman Catholics of all disabilities and penalties, so that, even if the old Acts to some effect still remain, they are no longer armed with these penal sanctions. But we shall assume, on the other side, also without indicating an opinion, that the Acts of 1690 and 1707 in favour of "the Protestant religion" still subsist, and that the ancient Reformation statutes to which these look back are so far confirmed. And now, confining ourselves to these Reformation statutes (of 1560 and 1567), we propose in this paper the still more restricted inquiry, Assuming that these statutes subsist, but subsist without pains and penalties, *in what manner* do they bear upon a modern Hierarchy? And what do they imply as to common law?

1. One of the Reformation statutes is very direct and express in its provisions. The Act 1567, c. 2, ratifies an Act of 1560, and in the same terms with it statutes and ordains "that the Bischop of Rome, called the Pape, have na jurisdiction nor authoritie within this Realme in ony time cumming; and that nane of our said Sovereaine's subjects, in ony time heirafter, sute or desire title or richt of the said Bischop of Rome, or his sect, to ony thing within the Realme; under the pains of Barratrie, that is to say, proscription, banishment, and never to bruke honour, office, nor dignitie within this Realme; . . . and that na Bischop nor other Prelat of this Realme, use ony jurisdiction in time cumming, be the said Bischop of Rome's authoritie, under the paine foresaid." Now this is very distinct; and even if we suppose that the penalties and disabilities here provided are repealed among those of all Acts "against Popery and Papists" confirmed by King William, there

would remain the abolition of a jurisdiction previously to some extent acknowledged, and the prohibition (whether enforceable or not) of certain acts founded upon it. If this statute indeed stood alone, a very serious question would arise whether it was now at all in force. It is eminently an Act "against Popery and Papists," and might therefore seem to be directly confirmed by the Act 1700, c. 3, and repealed by the Act 8 & 9 Vict. c. 59. And apart from this, were it a solitary Act, it would almost certainly be held (having no sanctions) to be in desuetude. But this Act is not solitary, and some expressions in its own preamble invite us to pass outside of it. The ground of the enactment is that the three Estates understand that "the jurisdiction and authoritie of the Bishop of Rome, called the Pape, used within this Realme in times bypast, has not only been contumelious to the eternal God, but also very hurtful and prejudicial to our Sovereaine's authority and common weill of this Realme." Now these expressions at once raise the question of the general or common law of Scotland. To say that a jurisdiction has been (not in its occasional exercise, but apparently in itself) "hurtful and prejudicial to the common weill," suggests that it is contrary to those fundamental and consuetudinary laws which in every country guard the general welfare. To say that such a jurisdiction has been "prejudicial to the sovereign's authority" is (in a kingdom so proud of its ancient monarchy as Scotland then was) almost equivalent to saying that it is contrary to our most ancient law. But to underfound these statements by the reason that this jurisdiction is "contumelious to the eternal God," is to introduce a kind of reason still less subject to variableness and shadow of turning, than even the welfare of the State and the authority of the king. It at once drives us to ask whether in the other legislation of the time there is any attempt made to recognise the "law of God" as part of the common law of Scotland, and to represent the Papal jurisdiction, and possibly also the Papal religion, as inconsistent with it.

2. We have not far to go in this inquiry. The very next Act (1567, c. 3) narrates that divers and sundry statutes had been passed in the reigns of James I. and his successors "not agreeing with God's Holy Word, and by them divers persons *took occasion* to maintain idolatry and superstition *within the Kirk of God*, and repressing of sik persons as were professors of the said Word, wherethrough divers innocents did suffer." And accordingly all such Acts are annulled. Here again it is clearly implied that these Acts were an injurious innovation on the proper state of matters—they were, as is said in the end of the Act, "not agreeing with God his Word, and now contrary to the Confession of Faith according to the said Word." We shall see afterwards the effect of the Confession of the Faith, which is here introduced as ratified and approved in "this present Parliament;" and we now pass

on to the next Act. By it (1567, c. 5) the mass is forbidden under heavy penalties. These, we may suppose, are obsolete; but we are at present concerned with the *ground* of the legislation. It is thus stated: "Forsameikle as Almighty God *by his maist true and blessed Word* has declared the reverence and honour which should be given unto him, and by his Son Jesus Christ has declared the true use of the sacraments, willing the same to be used according to his will and Word; by whilk it is *notour and perfetly known* that the sacraments of Baptism and of the body and blood of Jesus Christ have been *in all times bypast corrupted* by the Papistical Kirk and by their usurped ministers." Here we have a very full declaration of the way in which the statutes view the matter. "God's Word" is their authority, and it is an ancient and public thing, which had been obscured and "corrupted," but was now restored. And the penal legislation is founded on the restored publicity. It prohibits acts done "in quiet and secret places," as the same Act puts it, "notwithstanding the reformation already made according to God's Word;" and the word "Re-formation" is to be here taken in its literal and etymological sense. The statute which follows, "On the Kirk," is of the highest importance; but we shall take it under another head. The last of the group we shall mention is 1567, c. 8, appointing a coronation oath to "maintain the true religion of Christ Jesus," and to rule the people "according to the lovable laws and constitutions received in the realm, nowise repugnant to the said Word of the Eternal God." All these statutes of 1560 and 1567 (and they are only the central enactments among many others of the same sort) speak with one voice. They make "God's Word" part of the "common law of the world," to use Stair's phrase; and *therefore* part of the common law of Scotland—indeed its first and most sacred part. And they condemn alleged false religion, especially that of "the Paip," as innovating upon and a corruption of this law. But in addition to the language of the three statutes of 1567, revised from 1560, which we have quoted, there is a still more conclusive consideration. These are all in form negative. But the intermediate and most important of the three abolishes all old statutes "not agreeing with God his Word, and now contrary to the Confession of the Faith according to the said Word, published in this Parliament. . . . Of the whilk Confession of the Faith the tenour follows;" and it is then engrossed bodily into the statute. (We observe here, by the way, a fine distinction accurately kept up. The old Lionianist enactments were always contrary to God's Word and to "the faith;" but they are now also contrary to the Confession of that faith.) And this Confession is positive enough in all conscience. What was its relation to these negative statutes? They were all passed, and are confirmed as having been passed, on the 23rd and 24th August 1560. But the Confession was passed on Saturday of the *previous week*; as the

appendix to 1567, c. 3, narrates, all its articles were "read in the face of Parliament, and ratified by the three Estates, at Edinburgh the 17th day of August, the year of God 1560 years." It is plain therefore that chronologically, as well as in order of nature and of logic, the adoption by Parliament of a positive Confession of the Faith, or of "the religion," as it was called, preceded and was the foundation of all these special statutes. They are negative, as rescinding and forbidding Acts inconsistent with the faith which the Estates had a few days before professed. For the statutory title of this, the original (and perhaps the only national) Confession of Scotland, is, "The Confession of the Faith and Doctrine, believed and professed by the Protestants of Scotland, exhibited to the Estates of the same in Parliament, and *by their public votes authorised, as a doctrine grounded upon the infallible Word of God.*" We have no intention of going into the contents of this remarkable document, whose glow of conviction as to the objective existence of religious truth burns strongly after three hundred years. But no one can read it, even cursorily, in connection with the Acts with one of which it is incorporated, without coming to these conclusions: (1) It represents the truth which it confesses as the old, original, truth revealed by God to man, and patent to all in Christian times who are willing to receive the scriptural revelation without overlaying it with human additions and inventions; (2) it defines the "true Kirk" primarily by its possessing this true doctrine, and asserts that it exists in Scotland "in our cities, towns, and places reformed;" (3) it refers to the "Kirk malignant," meaning thereby chiefly the Roman Catholic "usurpation" (as another statute calls it), as a corruption and an innovation upon truth, and an aggression upon the true Church. Now this gives us a complete explanation of the remarkable fact that the leading Acts of 1560, renewed in 1567, are all negative, prohibitory, or rescissory. They rescind statutes "not agreeing with God's Word," and they prohibit Papal jurisdiction and the mass, but they do not erect or establish Protestantism. Protestantism, according to the idea which pervades all of them, is the original truth which these excrescences had obscured; and now that these are swept away, "God's Word" remains as already a foundation of the law of Scotland—a foundation which may be confessed and may be built upon, but which has not to be laid. It is part of the common law.

Now, how does all this bear upon the existence of a hierarchy appointed by the Pope in 1560, or in 1878? In the first place, it was not merely forbidden by an isolated statute; it had a whole cluster of statutes, and system of legislation, more or less against it. In the next place, these statutes proceed upon and enounce certain general religious principles as principles of law, and on these principles they base the particular statutory prohibitions of the hierarchy and the mass. In the third place, if we assume that these statutes subsist (though their pains and penalties are no longer

enforceable, then the new hierarchy in 1878, as truly as the old, is struck at directly by the statute 1567, c. 2, but much more weightily by the general religious principles confessed and affirmed by all the statutes as underlying them all.

3. We have said little hitherto of statutes in favour of the Reformed Church. It can scarcely, indeed, be said that there was any enactment establishing it till 1567: the Confession and statutes of 1560 at the most established "The Religion," as it was called, leaving the Church to its own regulation. Of course the long line of statutes in favour of the Church in 1567, 1572, and 1690 are of great importance as in other respects so in this: they all more or less confirm the original Protestant position taken up in 1560, and they carry down the general law so as to show that it at least (whatever may have become of pains and penalties) is not repealed or in desuetude. But we have reserved this matter because it raises a finer question than that with which we have already dealt. The great Reformation statute about the Kirk is 1567, c. 6, which defines what the Estates of Scotland hold to be "the only true and holy Kirk of Jesus Christ within this realm." Now, was this a wholly new Church, dating from 1560, or was it a continuation or reproduction of a Church existing previously in Scotland? The question is by no means an easy one, even on the ecclesiastical side. On the one hand, the violent revulsion in Scotland, more than in most countries, from Romanism, makes it appear as if there was an absolute break of continuity. On the other hand, Knox, in cases where it was convenient to do so, *e.g.* in claiming "the patrimony of the Kirk," made no scruple to assert a succession and right of inheritance. Let us, however, confine ourselves to the statutes. The leading Act, "Anent the true and holy Kirk, and of them that are declared not to be of the samin" (1567, c. 6), speaks only of the present and future, declaring the ministers of the Evangel "whom God has now raised up amongst us or hereafter shall raise," and the people professing and communicating with them (all "according to the Confession of the Faith" before mentioned), to be the only Church in the land. This rather looks a *res noviter*. But a similar Act, of a later date (1579, c. 69), has a suggestive variation of phrase. It declares "that there is no other *face* of Kirk nor other *face* of religion than is presently, by the favour of God, established within this realm." This reminds us of a striking passage of Knox, where he declares it to have been the end of all his efforts "that the reverend face of the primitive and apostolic Kirk should be reduced again to the eyes and knowledge of men." But it also raises the question whether, as the statutes of 1560 seem to intimate that there was a true religion anterior to the false "face" of religion in Romish times, so they do not hold also that there was a true Kirk even in Scotland, though with a false face superinduced. We saw that the statute 1567, c. 3, abolishing Popish Acts of all the pre-

vious reigns as far back as James I., spoke of them as Acts by which "divers persons took occasion to maintain idolatry and superstition *within* the Kirk of God," which certainly looks like an acknowledgment of a previously existing Kirk, disfigured and vexed by innovations. A stronger indication, perhaps, is found in the statutes which go back upon what the Acts of previous reigns had described as the "freedom of holy Kirk." Thus the Act 1571, c. 35, "ratifies and approves all and whatsoever Acts and statutes made of before by our Sovereign Lord, or his predecessors, anent the freedom and liberty of the true Kirk of God, and Religion now publicly professed within this realm." The reference certainly seems to be to the long series of statutes, 1424, c. 1; 1424, c. 26; 1443, c. 7; 1446, c. 1; 1489, c. 7; 1515, c. 1; 1535, c. 9; 1535, c. 36; 1551, c. 7; 1551, c. 18; and an attempt is apparently made to reckon these as in favour of an institute identical with the newly reformed Church. That institute must have been the invisible Church within Romanism, not the hierarchy or episcopate, which was swept away as part of the corruption and usurpation. It must be remembered that on the reformed principles the true Church is not necessarily defined by outward notes or external organization; and that even those who spoke most strongly against its organization under Rome, held that a Church might exist alongside or within ever so much corruption—"be the number never so few, about two or three, there without all doubt is the true Kirk of Christ." (1567, c. 3).

These things give a hint how it may conceivably have been held that the statute law, and even the common law of Scotland, *before* the Reformation, were substantially in favour of the Kirk, in the universal and reformed sense; and needed merely the statutory striking off of excrescences, by the Acts we have quoted. But this view is hinted at in our statute-book rather than formally adopted; and considering how early our nation and Church came into close relations with Rome, it is well that no such questionable antiquarianism has been deliberately founded upon. The statutes of the Reformation are against Rome and its hierarchy, and they found themselves in this respect upon a common law which they represent as fundamental to Scotland. Such a law *might* be fundamental as being our ancient and consuetudinary law; but what the statutes mean is obviously rather the fundamental law of Christendom, and indeed of the world—a law which had for centuries been overlaid here by excrescences imported from a foreign jurisdiction. The foreign jurisdiction and its religious innovations being abolished by statute, the fundamental truth remains and is acknowledged as fundamental law.

A. T. I.

FAMOUS SCOTTISH TRIALS.

KATHERINE NAIRN AND PATRICK OGILVIE FOR MURDER.

IN the year 1765 a trial took place before the High Court of Justiciary which created intense interest among the public, not only on account of the nature of the crime charged, but from the youth and social position of the prisoners themselves, and the conflicting testimony which was given as to the deeds alleged to have been committed. Besides being an interesting and important trial in itself, it was followed by a series of circumstances which threw a halo of romance round the whole affair, and formed a leading topic of conversation and gossip, both at the time it occurred and long afterwards, in the quiet old metropolis of Scotland. The story has more than once been told since that time; but as it is probable that many of the readers of the *Journal* have never met with any of the accounts, we venture to think that a short statement of the principal features of the case will not be found altogether destitute of interest and instruction, illustrating as they do the criminal procedure of our Supreme Court in the last century. Our account is chiefly taken from a report of the case which was published at the time, but a good deal of incidental information is to be found in Wilson's "Memorials of Edinburgh" and other antiquarian books.

Katherine Nairn was the daughter of Sir Robert Nairn, Baronet, of Dunsinnane. She was a young lady of remarkable personal attractions, united, however, to a character of levity and indiscretion. She was married when barely nineteen to Thomas Ogilvie of Eastmiln, in the county of Forfar, a gentleman well advanced in years, and, according to the prisoner's statement, of small fortune, though, if this was the case, it is somewhat difficult to see the inducement she had to marry him. The wedding took place in the latter part of January 1765. At this time there was living in the house of Eastmiln Patrick Ogilvie, the laird's brother: he was a lieutenant in the 89th Foot, and was home on sick-leave from India. There was another inmate of the house whom we must mention: this was a cousin of the laird, Ann Clark. She seems to have been a woman of very dissolute character. The reason of her presence at Eastmiln was to try to reconcile the family there with another brother of the laird, Alexander Ogilvie, who had, it seems, been "cut" by his friends on account of some *mésalliance* he had made. Such being the domestic relationships of the Ogilvies, Mr. Ogilvie, the laird, was seized with sudden illness on the 6th of June, little more than four months after his marriage, and died in the course of that night. Investigations were made by the authorities, and the result was that Katherine Nairn and her brother-in-law, Patrick Ogilvie, were brought up at the bar of the High Court of Justiciary on the 5th of August 1765, charged with the crimes of incest and murder. It is the story of this trial which we now propose to relate, freed as

much as possible from the prolixity and repetitions of the contemporary report.

It was, we may be certain, with much reluctance that all the parties connected with the case found themselves immured in an ill-ventilated court-house on a hot day in August. Six perspiring Senators sat on the Bench: the accomplished and able Lord Justice-Clerk Sir Gilbert Elliot presided; Lord Auchinleck was next him; then came the eloquent Andrew Pringle, Lord Alemoor, a judge little remembered now, but whose opinions, Carlyle says, were delivered with more dignity, clearness, and precision than any judge he ever heard either in Scotland or England; the thin figure of Lord Kames, who had now been upwards of twenty years on the Bench, was next, ever ready to dispute with much ingenuity the opinions of his brethren—

“Alemoor the judgment as illegal blames;
 ‘Tis equity, you b——h!’ replies Lord Kames.”

The remaining judges were Lords Pitfour and Coalstoun, both eminent lawyers in their day. The Crown counsel were the Lord Advocate, Miller of Barskimming; the Solicitor-General, Montgomery; Sir David Dalrymple, Mr. Patrick Murray, and Mr. David Kennedy. The counsel for the defence were Alexander Lockhart, David Græme, David Rae (who attained celebrity as the eccentric Lord Eskgrove), Andrew Crosbie (afterwards Dean of Faculty), and Henry Dundas (Lord Melville), who had been admitted to the Faculty the previous year. There was, then, no lack of talent either on the Bench or at the Bar, and the cumbrous and lengthy procedure of those days afforded ample opportunity for the display of ingenuity and learning in debate.

The first day of the trial was entirely occupied with discussions on the relevancy of the indictment. This document, instead of, as now, briefly stating the nature of the crime libelled, and the time, place, and manner of its commission, embodied in itself a long detailed account of the perpetration of the crimes in question, and embraced all sorts of tittle-tattle down to the exclamations which the various parties used on certain occasions. All this story was read over, according to the fashion of the time, to the prisoners, both of whom, on being asked in the usual manner what they had to say, pleaded *not guilty*. Their counsel then read what were termed their “signed defences;” these were two lengthy documents giving the history of the case from the prisoners’ point of view, and urging several reasons why the indictment should not be held relevant. It is not necessary to discuss these documents at present, as we shall more easily and succinctly narrate the story when we examine the evidence of the witnesses in detail; it is sufficient to say that after the arguments for the prisoners had been duly replied to by the Crown, the libel was found relevant, and the trial adjourned for a week, to commence on the Monday after, at seven o’clock in the

morning! A petition was the next day presented by the prisoners, praying to have Ann Clark, who they alleged had a bitter hatred against them, to be confined separately, so that she might not be able to communicate with the other witnesses. This petition was granted, and the trial came on in due course on the day fixed. After a jury, consisting, it may be remarked, of very intelligent and superior men, most of them landed proprietors in the neighbourhood, had been sworn, the evidence for the Crown began to be led. The first charge to which the witnesses were called upon to speak was the subsistence of the alleged intrigue between the prisoners.

The first three witnesses who were called were persons living in the district, and spoke generally to having seen various acts of familiarity pass between the prisoners. Their evidence did not, however, apply to any acts beyond mere indiscretions. After some objections on behalf of the panels, which were repelled, Katherine Campbell, formerly a servant in Eastmiln, was put in the witness-box, and examined by the aid of a Gaelic interpreter. If her story is to be believed, there might be some grounds for suspecting the prisoners of an improper intimacy; but her evidence is very confused, and she broke down under cross-examination: altogether the impression conveyed by her testimony is not favourable to the credibility of the witness. Ann Clark, to whom we have formerly referred, was then called: she was not allowed to take her place as a witness, however, without strong objections from the prisoners, and her character was assailed in a series of charges which made her out to be one of the most worthless women in existence, and asserted that she had deadly malice and inveterate ill-will against the prisoners. The objections were repelled, and she proceeded to give her evidence, which was to the effect that, from what had come under her own observation, she had no doubt that the prisoners had a *liaison* together, that she had expostulated with Mrs. Ogilvie on the subject, and had also mentioned the matter to the mother of the laird, who was also living at that time at Eastmiln. The old lady communicated what she had heard to her son the laird, and in consequence there was a quarrel between the brothers, and Lieutenant Patrick Ogilvie was ordered out of the house, which he accordingly left. This happened on Thursday the 23rd of May. After the lieutenant's departure there appears to have been a scene between the husband and wife, and there was some talk of a separation, but the quarrel blew over. The witness averred that previous to this time Mrs. Ogilvie had on several occasions expressed her desire to the witness to poison her husband, and that on the day on which Patrick left she had told her that she had prevailed upon the lieutenant to procure and send her poison for the purpose. Some days then elapsed without anything of importance occurring, but on Wednesday the 5th of June Mrs. Ogilvie informed the witness that she had received a letter from the lieutenant through Elizabeth Sturrock, one of the servants, in which

he told her that the poison was at Alyth, and that it would be sent by the hands of Andrew Stewart, his brother-in-law. The witness expostulated, according to her own account, with Mrs. Ogilvie on the wickedness of her conduct, but without effect, and in the evening Stewart arrived, and admitted to the witness in a private conversation that he was the bearer of two phials for Mrs. Ogilvie, whereon the witness said that they were "black drugs." Mrs. Ogilvie and Stewart having gone out together, the witness and old Mrs. Ogilvie—or "Lady Eastmiln," as she was called—had a conversation about the matter, in which they resolved to caution the laird against taking anything from his wife, without however telling him specifically that she was in the possession of poison. The witness then went to the Kirkton for the purpose of consulting the minister on the subject, but did not find him at home. She met, however, on her way back, Stewart, Mrs. Ogilvie, and her husband, and she took the opportunity of the two former walking on together to warn the laird of his danger; he answered that he understood what she meant, but that he would not take anything from his wife. This witness also said that Mr. and Mrs. Ogilvie had had a quarrel that morning, and that he had gone away early in the morning and come back at night saying he felt ill, and then went to bed without supper. On that evening Andrew Stewart, old Mrs. Ogilvie, and the witness had a conversation about the drugs which he had brought from the lieutenant, and it was agreed that if possible they should be got out of young Mrs. Ogilvie's possession. There the matter rested for the night.

Next morning, when the witness came down to breakfast, she found that tea had been made rather earlier than usual, and that Mrs. Ogilvie had already taken some up to her husband in bed. It was an unusual thing for the laird not to come down to breakfast. During that meal the female prisoner went out of the room once or twice, and at length came in, saying that the laird had been taken very ill; whereupon old Lady Eastmiln told the witness to go and see how he was, which she did, and found him apparently "in a dying condition." Having reported this to the old lady, she was, about midday, sent up again, "to keep him from those two women," as his mother said, meaning thereby his wife and a servant, Elizabeth Sturrock, of whom we shall hear more hereafter. The witness was now in attendance upon Mr. Ogilvie until his death, which occurred about twelve hours after. She described his symptoms with great minuteness: they consisted in severe purging and vomiting, intense thirst, a burning pain at the heart, and constant restlessness of the limbs. He said to one James Millam, who was assisting in the room, that it was "strong poison" or "rank poison" that was killing him; and when his mother reproached him for breaking his promise in taking anything from his wife, he replied, "It is too late now, mother; but she forced it on me." There seems to have been some conversation about send-

ing for a surgeon, and indeed one was eventually sent for, but did not reach the house until too late. The next morning the lieutenant arrived, having been residing in the neighbourhood, and the witness informed him that she knew of his having sent the poison; whereupon the lieutenant, with great concern and confusion, said, that suppose he had sent it to her, he did not think she had such a barbarous heart as to give it. On cross-examination of the witness by the prisoners' counsel, nothing very material was elicited: no one had been present at the conversations between old Lady Eastmiln and her. There is also some vague and rather confusing evidence about Alexander Ogilvie having been at Eastmiln, but that was probably not till after the laird's death. Immediately after that occurrence the witness was dismissed from the house by Mrs. Ogilvie.

Such was the story told by Ann Clark, and if her statements were true, they pointed strongly against the innocence of the prisoners. Still, her assertions were but vague, and in regard to the death of Mr. Ogilvie, at least, though the circumstances might be suspicious, there was no actual proof of poison having been administered by any one, or indeed of poison having been brought into the house at all. It may be remarked that old Mrs. Ogilvie was not called to give evidence in the trial. The next witness was the servant who carried the letters between Mrs. Ogilvie and the lieutenant after the latter had left Eastmiln. After stating her reasons for believing the existence of an intrigue between the two prisoners, Elizabeth Sturrock, the girl in question, stated that on three occasions she had conveyed letters privately from Mrs. Ogilvie to her brother-in-law and taken back answers. She also said that on the morning on which the laird had been taken ill he had been out, but returned, complaining of sickness: the witness then gave the details of his symptoms, adding that he said that woman (meaning his wife) had poisoned him, and expressed a desire that she should not come near him. The day after the laird's death the lieutenant came to Eastmiln, and had an interview with Mrs. Ogilvie in a stable, which lasted, however, only four or five minutes. Both the prisoners, on hearing shortly after that the matter was to be taken up by the authorities, desired the witness to say that she had seen the cup of tea made by Mrs. Ogilvie, had drunk some of it previously to its being given to the laird, and had finished what he left, promising that if she did so she would be well looked after for the rest of her life. The witness also said that she took the bowl out of which Mr. Ogilvie was said to have drunk the poisoned tea, and, observing "something greasy in the bottom of it," put some broth into it, and administered it to a dog, which, however, displayed no evil effects from taking it. She denied having been tampered with by Ann Clark, and declared she had no motive but to tell the truth.

Ann Sampson, another of the servants at Eastmiln, was next

called, and after deponing to the intimacy which existed between the two prisoners, and which, from circumstances which came under her own observation, appeared to be of a criminal character, stated that on the morning of the day on which the laird died she saw Mrs. Ogilvie make up the bowl of tea in presence of old Lady Eastmiln and Ann Clark; that she followed her mistress upstairs on some domestic duty, and saw her go into a closet and there stir the tea, but did not see anything put into it; Mrs. Ogilvie, however, angrily ordered her downstairs. Mr. Ogilvie's illness was then described in much the same terms as the other witnesses used; but in the course of the morning Sampson was ordered to carry up some clean drinking-water to the laird. She put this water in the same bowl as the tea had been in, having previously rinsed it out or "synded" it with water, because it appeared to be greasy and white; but even after this rinsing a little sediment remained. She took up the bowl to her master, who when he saw it immediately cried out, "D—n that bowl, for I have got my death in it already!" The rest of the evidence of this witness corroborated, in the main, that of the others.

Lieutenant Ogilvie's brother-in-law, Andrew Stewart, who, we have seen, brought certain phials to Mrs. Ogilvie, was next examined. The principal fact that he deponed to was his getting from the lieutenant a phial which he was told contained laudanum, a small paper packet of what were said to be salts, a sealed letter, and a loose paper of directions as to how the laudanum was to be used: these he was enjoined to deliver into Mrs. Ogilvie's own hands. Witness could not state positively whether he got one or two phials, but thought there was only one. Ann Clark, it may be remembered, had said there were two. He then referred to the conversations between Lady Eastmiln, Miss Clark, and himself, and stated that he heard the old lady caution the laird to take nothing from his wife's hand. He also heard Mrs. Ogilvie say that she led a very unhappy life with her husband, and wished him dead, or, if that could not be, that she herself were dead. When the laird came home the night before his death he supped with his family, but mentioned that he had "swarfed" or fainted on the hill that day; he then took a dram, and seemed well and hearty. The occurrences of the next morning were then spoken to as before, the witness stating that it was owing to his leaving the house early that breakfast was sooner than usual. Mrs. Ogilvie was at first unwilling to send for a doctor, but eventually consented to Mr. Meik of Alyth being sent for. All the things which had been brought by witness from the lieutenant were put by Mrs. Ogilvie into a drawer in her bedroom, and there was some talk between witness and Ann Clark of breaking open this drawer and taking them out, but nothing was done. He also stated that Mr. Ogilvie was rather a delicate, or, as he expressed it, a "tender" man, and had been complaining some time previous to his death. After that event witness had urged

the lieutenant to make his escape if guilty, but that gentleman assevered that God and his own conscience knew he was innocent.

Such were the witnesses who spoke to the events occurring at the house of Eastmilm at the time of the laird's death. There is no doubt that their evidence forms a very connected story, and the testimony of each witness agreed with that of the others in all important particulars, though no doubt much irrelevant matter was admitted which nowadays would not be listened to. If we are to believe these persons, there is no doubt that the prisoners were guilty of a criminal correspondence, that Mrs. Ogilvie had received certain packets from the lieutenant, and that the laird had died under circumstances which pointed strongly to his death having been occasioned by partaking of poison administered in a bowl of tea by the hands of his wife. The Crown now set themselves the task of proving what the poison was, and how it had been procured. Dr. Carnegie, a surgeon in Brechin, deponed to his having sold to Lieutenant Ogilvie, in the end of May, a phial of laudanum and nearly an ounce of arsenic in a packet, or at least a powder which the doctor had labelled arsenic, and which he believed to be such. The circumstances of the purchase were minutely given, but it is not necessary to go into them in detail; they were corroborated by other two witnesses.

Dr. Meik of Alyth spoke to his having been sent for to see Mr. Ogilvie, but only arrived two hours after he had died. Mrs. Ogilvie appeared to be in great grief, and asked the witness that whatever he might think was the cause of her husband's death, he would conceal it from the world. No examination of the body was made at the time, but five or six days afterwards both Dr. Meik and Dr. Ramsay of Cupar saw it, and observed that the nails and part of the breast were discoloured, and the tongue considerably swollen. Neither of these gentlemen, however, having seen any one who had died of poisoning of any sort, could speak with certainty to the cause of the symptoms. They wished certainly to open the body, but Alexander Ogilvie, the brother of the deceased, who had arrived at Eastmilm, would not allow it unless Dr. Ogilvie of Forfar were present. That gentleman only arrived after the others had gone, and he was equally unable to speak positively as to the cause of death. The body was then buried without any examination of the stomach, a proceeding which does not reflect much credit on the authorities of the district. The Crown endeavoured to bolster up their evidence by calling Dr. Smith of Edinburgh, who had once had a case of poisoning by arsenic under his care. He described the well-known external symptoms during life, but admitted that similar symptoms might be produced by other causes; he also said that the body after death presented no abnormal appearance externally. Some additional evidence was led as to the laird's having said that he was poisoned, and as to Mrs. Ogilvie having been in the closet at the top of the stairs when Ann Sampson was speaking to her.

Three letters of the female prisoner were also read, one to the lieutenant, and the other two apparently to her husband. The declarations were then read. The lady avers in hers that what she got from the lieutenant were salts and laudanum for her own use, she not being well. She does not allude to the alleged intrigue in any way. The lieutenant's story is much the same; he denied getting any powder or laudanum from Dr. Carnegie, and states that the salts and laudanum which he sent Mrs. Ogilvie were taken from his own medicine-chest which he used in India. These declarations were taken at Forfar before the Sheriff-Substitute there; when the panels were removed to Edinburgh, they were again subjected to a series of interrogatories at the hands of Mr. James Balfour of Pilrig, the Sheriff-Substitute of Edinburgh. The queries, some of them of a ludicrous enough nature, are given in the report of the trial, but as to the great majority of them both the prisoners refused to give any replies, there is no need to repeat them here, although they were read to the jury. The case for the Crown was now closed, and the exculpatory evidence led; there was a list of no less than 108 witnesses for the prisoners, but of these only eleven were called. Most of them spoke to Mr. Ogilvie having been in a weak state of health for some time before his death, and especially that he had been complaining on the day immediately preceding that occurrence. James Millam, one of the laird's tenants, and who had been previously examined for the prosecution, stated that he knew Mr. Ogilvie very well, his house being within a "penny-stone cast" of Eastmilm. His testimony as to the state of the laird's health prior to his death is very strong. Four days before his decease Mr. Ogilvie complained to the witness of a gravel and a colic, and said that he could not live if he did not get the better of it: on the Tuesday he was very ill, and refused supper, saying "that he would have no supper but the fire; and that he was fading as fast as dew goes off the grass." He also told witness that he could not get peaceable possession of his own house for Ann Clark, and that he wished her away. He borrowed money, too, from the witness to pay her journey. Ann Clark herself was dissatisfied at the mournings she got, especially at the want of an apron, and said that she would make it as dear to them (the prisoners) as if it was a gown. A Dr. Scott gave evidence as to the non-solubility of arsenic in water, and the Sheriff-Substitute of Forfar deponed to his having found a whitish powder in a drawer of the house. This was shown by him to Dr. Carnegie, who could not state from its mere appearance whether or not it was arsenic; Dr. Cullen and Mr. Russell, a physician and surgeon in Edinburgh, seem, as far as can be gathered from the report, to have tested this powder in Court before the jury. They were not themselves examined, but from the results of their observations, Mr. Campbell, the Sheriff-Substitute, states in his examination that "he believes it to be saltpetre!"

This concluded the evidence; the trial had lasted three days, including that on which the relevancy of the indictment was debated. We are not told of any address to the jury either by the Crown or the counsel for the defence, but from expressions which occur afterwards it is evident that the usual speeches were made. Though many suspicious circumstances had come out in the evidence, yet whatever might be the case as to the intrigue on which the charge of incest rested, it could hardly be said that the charge of murder had been satisfactorily made out. In fact, beyond the statement of the deceased himself that he was poisoned, there was not a shadow of proof to show that poison of any kind—far less arsenic—had been the cause of his death. There had been no examination of the stomach, and the only powder found on the premises had turned out to be saltpetre. The jury, however, as we shall see, had made up their minds; but their verdict could not be given for some time, as it was between one and two o'clock in the morning of the 14th August that they were ordered to retire, and to return their verdict at four o'clock the following afternoon. At that time accordingly the Court again met, the jury by a large majority found both the prisoners GUILTY of the first charge; Mrs. Ogilvie GUILTY of murder, and the lieutenant GUILTY *art and part* thereof. On the motion of the prisoners' counsel, however, sentence was delayed, and the case adjourned till the next day. When the Court then met, counsel for the defence urged that no judgment ought to pass on the verdict in respect of informality in the proceedings; and certainly their statements display, to say the least of it, a most extraordinary want of decorum in the way in which the trial had been conducted. On the very first day on which evidence was led, the jury rose about three o'clock and dispersed themselves over the Court, eating, drinking, talking to their friends, and sometimes even going out of Court altogether. It must be confessed, however, that the hours kept were such as to try the patience of any man, for we are told that on Tuesday, 13th August, *between the hours of three and five in the morning*, the jury again dispersed themselves over the Court; not only so, but the judges broke up also, "retiring and conversing in private with sundry of the jury and others," leaving only the attenuated figure of the untiring and energetic Kames to represent judicial dignity on the bench. One portion of the arguments in arrest of judgment illustrates so pointedly the manners of the time, and is so amusing in itself, that we cannot resist giving it in its entirety. Counsel remarked—

"That it is vain, in the present case, for his Majesty's advocate to plead the necessity of the jury being refreshed in such a case; for they were refreshed on several other occasions besides those above mentioned, at which times the refreshments were always given them in their seats; and it is apprehended that always ought to be the case, as it is a material point that the quality and quantity of the refreshments they take, particularly the wine and other strong liquors, should be regulated by the Court, under whose immediate inspection everything of that nature should be given them; but by jurymen dispersing

and drinking liquors in *what quantity* and of *what quality* they please in private, and while removed from the inspection of the Court, there is a *hazard of their becoming intoxicated* with the liquors they drink, which may be of the most dangerous consequences to the security of those who are tried, and consequently to the lives and liberties of the subjects in this country in general."

Besides this pretty plain charge, it was asserted that the jury had shown great impatience and bias; that they had disputed the relevancy of questions put by the prisoners' counsel, and that they would not listen to the exculpatory evidence for more than three hours, though thirty-three hours had been spent in hearing the witnesses for the Crown: several of the jury had frequently retired without leave asked or given, and unattended by a macer. It was particularly objected that after the speeches for the defence had been made, and nothing remained but to direct the jury to retire to consider their verdict, one of the judges had charged the jury at considerable length. This was pointed out to be at variance with an Act passed in the reign of Charles II., which provided "that, in all criminal pursuits, the defender or his advocates be always the last speaker except in case of treason," etc. and that this Act had not been altered by 21 Geo. II. cap. 19, which allowed the judge to charge the jury, as the latter statute did not alter the procedure in trials involving loss of life or limb, and where the evidence was taken down in writing. Certain technical objections also were taken to the record of the trial and the formality of the verdict. The Lord Advocate's answer to all these objections was of course a general denial of the truth of the statements, and it was asserted by him that no trial had ever been conducted with so much attention and favour for the defence of the panels as this one had been, and that the pleas in arrest of judgment were unsupported by law, irrelevant, and frivolous. It is impossible now to say how much truth either party had on their side; but it is difficult to believe that the defence had not some ground for their assertions, made as they were by counsel of undoubted integrity and honour. It would have been a bold bench, however, who would in those days have "bowled out" his Majesty's advocate on objections like these, so we are not surprised to find that the judges unanimously repelled the whole objections.

The battle had been gallantly fought, but Lieutenant Ogilvie stood beaten at all points. There was, however, still a loophole of escape for the female prisoner, and her counsel were not slow to take advantage of it. She pled pregnancy, and "from her inexperience in these matters," not being able to say how far advanced she was in that state, she prayed their Lordships to cause examination to be made. Four "skilful midwives" were appointed accordingly to examine the prisoner the next day. Meanwhile sentence was pronounced on the lieutenant "by the mouth of Isaac Gibbs, Dempster of Court," who, arrayed in his robes of office—black and grey, trimmed with silver lace—read the solemn words which con-

stituted the "doom" of the prisoner. Before again adverting to Mrs. Ogilvie, we may follow her brother-in-law to his fate, which was a particularly hard one. By the exertions of his friends he was respited no less than three times, but in spite of this he was at last executed, a victim to the bloodthirsty laws of the period. By a curious coincidence the regiment to which he belonged happened at the time to be stationed in Edinburgh Castle, and so popular was the unfortunate officer with his fellow-soldiers that the gates of the castle were closed and the regiment confined in barracks during the time of execution, lest they might have attempted to rescue the prisoner. The late eminent antiquary Charles Kirkpatrick Sharpe gives us some curious reminiscences of the event.¹ "His aunt, Lady Murray of Clermont, lodged then near the Bowhead; and she and his mother went to Goodtrees at the time of the execution, to escape the horror of even hearing the noise attendant on such a tragedy. 'But,' he adds, 'a near relation of mine, a lady! paid five shillings for a window in the Grassmarket to see this execution. But she always chose to forget it when I talked about it, and I wish to forget it too, as she was the kindest of relations to me.'" The above price paid for a window in days when executions were almost everyday events, shows that considerable interest must have attached to the offender; and we can picture to ourselves the unhappy lieutenant, in crimson coat and lace cravat, carried to his doom, gazed upon in pity from the windows of the lofty houses in the street by eyes that sparkled with the tear of sympathy.

On the 16th of August Mrs. Ogilvie—or Katherine Nairn, as she is invariably styled in the report—was duly examined by no less than five formally-sworn *sages-femmes*, who reported that they could give no positive opinion as to whether the prisoner was pregnant or not; whereupon sentence was delayed until the third Monday of November, on which date another report was to be made by these servitors of Lucina. Before that time, however, the case had assumed a different and very romantic phase. By her youth and good looks the lady had won much sympathy during the latter part of the trial; formerly, it must be confessed, public opinion was so much against her, and she excited so much disapprobation by the levity of her behaviour, that on her arrival at Leith in an open boat, she made a narrow escape of being pelted by the mob, and it was with some difficulty that she was conveyed to prison by the authorities. After the trial she was conveyed back to the Tolbooth—that convenient old prison, which had such a fatal facility of *leakage* when any prisoner in high life was concerned. Here Mrs. Ogilvie was attended by a midwife—Mrs. Shiells, a practitioner of her art well known in Edinburgh down to the early part of this century—and here in course of time she either was, or pretended to be, confined. If this was really the case, her recovery must have been

¹ Wilson's Old Edinburgh. Douglas. 1878.

very rapid, as, two days after the event, she escaped from prison disguised as her nurse, with her head enveloped in shawls as if suffering from toothache. It was shrewdly suspected that neither the turnkey of the jail nor the Lord Advocate himself were altogether ignorant of the elopement of the fair criminal. There are two accounts of her adventures after she got out of prison: one is, that she was received by a friend and handed into a coach, the driver of which had orders, in the event of a pursuit, to drive into the sea, so that she might drown herself, and thereby be saved from the ignominy of a public execution. Another and more popular version of the story is, that on emerging from the Tolbooth, she went in search of her father's agent—some say, her cousin; mistaking the house, however, she unfortunately knocked at the door of no less a person than the Crown Agent—or Lord Alva, as some accounts have it. The footboy, opening the door with a candle in his hand, recognised her at once, having been present at the trial, and raised the alarm. She fled down the nearest close, however, and escaped, ultimately finding shelter in a cellar attached to the house of her uncle (afterwards Lord Dunsinnane), half-way down the old back stairs of the Parliament Close. She lay hid there for some weeks, but eventually assumed the uniform of an officer, and, under the charge of one of her uncle's clerks, journeyed to Dover, where she took ship. It is said that the unfortunate clerk lived in constant fear of detection from her thoughtless levity of disposition and frivolous conduct. If this be true, she must have improved in her latter years, as we are told that she married a French gentleman, and died at a good old age, surrounded by a numerous and attached family.

Such is the story of this remarkable case. We have of necessity omitted many interesting particulars, more especially as relates to the procedure at the trial itself. Still, what we have recorded may help to throw some light upon the legal customs of the time. It is sad to reflect on the result of the trial. If both prisoners were guilty, the one who was least criminal suffered the severest penalty; if both were innocent, the miscarriage of justice was scandalous. It is needless to say that no prisoner would now be convicted by any jury on such evidence as was then adduced; and we cannot but be surprised, even allowing for the low state in which the science of forensic medicine then was, at the laxity of the Crown officials in not endeavouring to prove, with some show at least of accuracy, that the deceased gentleman had met his death by arsenical poisoning. The whole features of the case present a curious picture of the times, and whether we look at its legal or its romantic side, it is not, we think, altogether unworthy of being rescued from the oblivion of a century.

ON CERTAIN PRINCIPLES AFFECTING THE LIABILITIES
OF MASTERS AND SERVANTS.

NO. IV.

IF, on the one hand, representatives of the working classes who gave expression to extreme views, and regarded only their own side of the question, were to be found among the witnesses appearing before the Select Committee of the House of Commons, yet, judging by the same test, it certainly must also be admitted that among the employers of labour and those who represented them there may be found indications of an equal amount of self-seeking, and an equal subservience of most things to self-interest. It will be necessary to take the evidence from this point of view, much as we have done from the other, that is to say, by singling out first those who were decidedly opposed to change of any kind, and were almost retrogressive in the conservatism of their views as regarded the existing position of the law, and then approaching the evidence given and the opinions expressed by employers of labour who really sought for that which, while just in itself both to themselves and to the workmen, might remove, or at least alleviate, the strain induced by such decisions as *Reid v. The Bartonshill Colliery Company*, or its corollary, *Wilson v. Merry & Cunningham*.

Among the first class of witnesses who expressed opinions strongly opposed to any change, there were some even who advocated a restriction of the liability of masters as now existing. Thus one gentleman, a Lancashire coal and iron master (Report, p. 42), thought that the law should not only relieve, as it does, the employer of labour from responsibility for accidents in cases where a certificated manager was employed, recognising such a delegation, but should further take away from the master who is his own certificated manager the responsibility that now rests upon him. It was distinctly explained, in putting a supposititious case, that the accident upon which the question was based had arisen through the negligence of the master, but the witness was for removing liability, and drew in his own mind a distinction between such a case and that of a coachman who drives his master's carriage over a passenger in the street—a distinction founded, he said, upon the absence in the latter instance of community of interest. It was further observed by Mr. Hewlett in his statement, as a ground for the exemption from liability of employers of labour, in collieries at least, that the character of the work undertaken was extremely dangerous, and that, from the manager downwards, those who engaged in coal-mining were aware of the hazardous nature of their occupation. The witness thought the pay of colliers was higher than that of other classes of workmen as a compensation for this risk, although we are not quite sure that at a time of commercial depression, such, for instance, as the present, that argument would bear the light of any careful statistical

inquiry. Still, the fact of course remains that wages have often to be paid when little or no profit is being made, although we can scarcely go so far as to state this generally or without exception, for many coal and ironstone pits at present have actually been closed, so as to avoid the loss inevitable upon continued working. It must also be remembered that in all such questions as to paying the men where profit is not being made, the masters are guided very materially by their own position as regards the pit. Suppose a man to be owner absolutely of the ground and of the mineral he is working, he can in bad times simply stop work, and wait until a better price can be obtained for his raw material; but, on the other hand, he may be, indeed we suspect he generally is, only a tenant, bound to pay, whether he works the mineral or not, a large fixed rent annually to the proprietor of the ground, in addition to the tonnage royalty. Then, placed as it were between two fires, the coalmaster or ironmaster must work on; for if he did not do so, his fixed rent would have to be paid at a dead loss, whereas, when he works the minerals, such little margin as he may make enables him at least to reduce the loss. The witness, in a subsequent portion of his statement, enumerated the protections afforded to the employees by the "Coal Mines Regulation Act, 1872," but these it is unnecessary for us to recapitulate. If the owner has fully carried out the provisions of the statute, he thought that nothing more should be required, and that "such provisions as were suggested would tend to take away that spirit of self-reliance which now exists, and would to a large extent debar miners from trying to keep their fellows from breaking the rules laid down for their safety." We cannot refrain from here making the observation that a miner is not likely, any more than another man, to stand by and see an act committed by his neighbour which may destroy both their two lives, and those perhaps of many others, without trying to prevent it by remonstrance or otherwise. The love of self-preservation is innate, and such recklessness as may be shown now would probably still be shown, but no more. The reckless workman who now exposes to danger the lives of himself and his comrades, would not be deterred from doing so by any change, nor above all is it likely that the careful man, prudent and anxious to avoid risks, now when the law provides his representatives with no rights against the carelessness of a manager, would become one and the same with his reckless, indifferent neighbour of yesterday, merely because by an act of the Legislature those whom he left behind him could to some extent obtain reparation for their loss against its ultimate author. Some valuable observations were made as to benefit and insurance societies, and their tendency to cement good relations between the employer and the employed; indeed the idea of rendering them compulsory both on the capitalist and on the labourer was broached, and a change of the law in the direction of increased responsibility on the part

of employers would, it was pointed out, impair the usefulness, and even peril the existence of these societies. "I for one," said the witness, "should not subscribe at all towards it, because it is a voluntary contribution. I should save my money for litigation in future if the law were altered. We should be in a constant state of warfare with our men, and should have to defend ourselves, and therefore all questions of charity would be gone. I speak for myself absolutely; and I think I may speak for the trade also."

Another witness, who took an extreme view of the question from the employer's point (Report, p. 90), was even in favour of an alteration in the law which makes a master liable where, for example, his keeper or his coachman is the cause of the accident. The ground for this was the doctrine that every contractor should be liable for what he did himself, but not for the actions of other people. Accordingly, upon this theory, a master working his own pit would, as at present, be liable, and one working through a manager, as at present, would be free from liability; but the menial servant would not as now render his employer liable, because he, just as his employer might be, was a contractor. Further, it was pointed out that "*qui facit per alium facit per se*" was a maxim perfectly just so long as the manager obeyed the directions of the master; "but," said the witness, "whenever a manager neglects, whenever he bungles, whenever he does wrong, he does it expressly against the desire, and against the intention of his master, and the master is generally the greatest sufferer in every case in which the manager does wrong. Therefore, in point of fact, the master never does wrong by another. He has instructed the manager to do right, and the manager himself does wrong; and being a British subject, and as responsible to the law as anybody else is, he should be the person who should bear the consequences of his own delict, and not the person who has not committed it." To act upon this view, as the chairman of the Committee pointed out, would be to violate the principles of our law of principal and agent. By that law we know that an agent may bind his principal, though he violates the private instructions he has received, provided he is acting within the authority conferred upon him. This witness, indeed, would have desired to see large modifications made in the law of reparation, and in other cognate branches of law, so as to carry out his views. He did not regard the liability as being a principle introduced for the purpose of compensating any one who had suffered by the negligence of another, but rather as a "means of enforcing carefulness on those who deal with the public,"—as, in fact, a check upon reckless persons. To produce this carefulness no "excessive penalties" were, Mr. Smith considered, necessary, for the consequences of extended liability would in the case of serious accident bulk enormously, and often involve the employer's financial ruin. In another portion of this evidence (Report, p. 92), the judgment in *Woodhead v. The Gartness Colliery*

Company was attacked as being an instance of the "infinite labyrinth of forensic casuistry" into which we must expect by the proposed change of law to be led. With some degree of justice it was also pointed out that in all such questions a rich, or at least a relatively rich defender would be the object of attack, and that against needless and oppressive actions the employer was entitled to be protected. The remedy suggested was twofold—first, a limit to the liability of the employer; and, secondly, some cheap tribunal, or cheaper form at least of procedure, so as to avoid the risk of saddling the employer with heavy costs in addition to his liability. Rather grave charges were made by the witness against a certain class of attorneys, who, according to his account, do not care which client had the money, indeed almost prefer to have the impecunious client themselves, in order to force a settlement from the wealthy opponent who is fighting against a man of straw. Before passing from this portion of the evidence we must mention that the witness was also careful to point out what really forms an important feature in the inquiry, namely, the difficulty of deciding where delegation begins or ends; "for," to quote his words, "who is to determine what or who is a manager and who a sub-manager, who a foreman of this department of work, or who a foreman of that part, and whether he is foreman in the same department as that of the person injured, or as that of the injurer? Then you have got the question of piece-work: a lot of men contract to produce a certain amount of goods by the piece, or to work by the job, and therefore they are actual contractors, and not servants at all. You have an infinity of questions at law if once you withdraw the protection to the master in these cases. Then mixed questions of law and of fact would be left to juries, who would decide in all diversities of ways, and be always tempted to lean unjustly to the poor man. So that masters would never know what the result would be; while A never hesitates to be liberal to B at the expense of C." Mr. Smith, who took these views, was a lawyer who had formerly practised in Scotland as one of what he termed "a mixed calling of men who are both solicitor and advocate, what are called procurators."

Mr. Heath, M.P. (Report, p. 83), also examined by the Committee, took another view, and seemed to be in favour of rendering workmen who caused accidents not merely civilly liable, but in default of payment criminally so. But, further, he seemed to think that "wilful and gross carelessness" of the manager should render the master responsible where any negligence on the part of the manager had been brought to the employer's knowledge, and no means to redress it had been taken. It was also stated by the witness that in his experience of ironworks the most serious accidents were those caused by explosion where liquid slag was carelessly thrown over in a wet place, but he was not able to give any instance of accident as the direct result of a manager's orders. In the evidence

of another witness (Report, p. 94) some interesting examples were quoted of accidents occurring from a variety of causes and in a variety of occupations. The view taken seemed to be in favour of conferring additional powers upon inspectors of factories and mines, and of enabling them to bring actions on behalf of the sufferers for penalties where they deemed it proper from the circumstances, and that also irrespective of the remedies open to the sufferer or his relatives. Such an action, but only "in the name and on behalf of" the sufferer, under the 24th section of the Act of 1844, was competent, but is omitted in the proposed Bill of Mr. Cross. No actions would, it was also suggested, be permissible unless with the certificate of the inspector. We cannot help doubting whether a provision of this character would work well, as there seems to be a twofold objection to it. On the one hand, inspectors of factories have not the requisite training probably, or the means of balancing the evidence, even were it ever properly presented to them. The facts would come either distorted by the views of one side or other, and according to the leaning, or the supposed leaning of the official's prejudices, his decisions would by master or by man be regarded with suspicion. Again, on the other hand, a regulation of this kind would really be creating a class privileged against legal remedies as they are usually understood, or at least protected against actions to which other men, including even their own workmen, would be liable; and all legislation of such a character has by long experience been found opposed to the true spirit of public policy, and the best interests of even those whom it is sought to privilege or protect. The following was given as an instance of the abuse which it was proposed by this device to remedy: "About three years ago one of the employees of my firm met with an accident in a factory. The boy was throwing something, putting his hand behind him to take up an implement to throw at one of the girls in a distant part of the room. He had no business to be where he was; but putting his hand behind him thoughtlessly, he put his finger directly into the cogs of a machine, near which he had no business to be; and he was taken to the hospital, and his father came down, and very much regretted his son's conduct, and the trouble he had given on other occasions besides this one of his carelessness. A few days afterwards the father called again, and asked what he was to have. The manager looked at him very oddly, and said, 'What do you mean?' 'Oh! I mean compensation: I am told that I ought to have compensation for this.' 'But your son ought not to have been doing what he was, and ought not to have injured himself.' The reply was, 'If you do not give me some smart compensation, you shall hear from me.' We soon afterwards received application for £500 damages from the father of the boy, who was a tailor; this was from a firm of lawyers who had got hold of this case; and I know as a fact that at one of the great hospitals in London, every case that goes into the

hospital is touted for with a view of feeding those who live upon such spoil. We received this application for £500 damages as a joke, and took no notice of it; but an action was brought, we won the case as defendants, but were mulcted in a loss of £198, 14s. 6d. by defending that case. We applied for costs, and got this characteristic reply from the solicitor to the plaintiff, 'Gentlemen, in reply to your application I beg to say my client has not one farthing.' No doubt such cases tend very much to irritate employers, and to make them regard all changes in the law with the suspicion that an increase in the crop of annoying and oppressive actions must be the result.

The opinion of a sub-inspector of factories was largely referred to by the same witness, and that official, in a letter written expressly upon this subject, said that he considered the master or employer should be held responsible for any accident where he used such machinery as to render an accident probable. Examples were then given of a case at Coventry in 1867, where a guard had been removed from a crank in a lace manufactory, and the woman at work not knowing this received a severe injury to her hand. Again, we are told that at some pipe-works at Brierley it twice had occurred that a boy feeding the mould with clay lost both his hands from the stupidity of a workman who let fall the plunger from above. Now, in these two instances the inspector pointed out there were the materials for an action of an entirely justifiable character against the employer—in the lace manufactory machinery had been improperly left unfenced; in the pipe-works, although of course the boy could not protect himself against the awkwardness of the workman, yet the arrangement was very faulty; and besides, in the second instance at all events, there existed the warning of the previous accident. The conclusion arrived at on the whole, however, was that "in all factories, as included under Mr. Cross's new Bill, there is sufficient protection of the workman if the penalties for non-fencing and liability of the factory owner to an action at law, on behalf of the sufferer, at the recommendation of the Home Secretary, acting on report of the factory inspectors, are enforced."

What we have selected thus from this portion of the evidence probably gives an adequate idea of the current of opinion among the more extreme section of employers who oppose a change; we have, however, yet before us in the Report valuable suggestions made upon this side of the question.

(To be continued.)

THE LUNACY ACTS.

THE attention of the Legislature has only been called to that unfortunate class of the community, the insane, within comparatively recent times; but the provisions regarding them are now sufficiently

numerous to render it somewhat difficult readily to say what is the precise state of the law at the present moment. A glance at these various enactments may, therefore, be of use to some of our readers, the more so as lunacy statutes have very frequently to be examined in an emergency. The subject naturally divides itself under the two heads of Civil and Criminal. The leading statute may be said to be that of 20 & 21 Vict. c. 71, which repealed the earlier ones. But in order to render our subject more complete, it may be advisable to refer to these repealed statutes, and show what was the state of the law when this Act was passed.

The Act, which may be said to be the foundation of all which have followed it, is 55 Geo. III. c. 69, entitled "An Act to regulate Madhouses in Scotland." A glance at its provisions is sufficient to show that, although far from perfect, it was a great stride in the right direction, and must have struck a blow at certain very terrible evils which, there is only too great reason to fear, then existed. Its tendency was to discourage private asylums or houses for the reception of lunatics, while it protected their inmates. No such establishment could be kept without a licence, the annual licence for each lunatic costing two guineas. Further, the inspection of private asylums by medical inspectors, under the direction of the Sheriff, was provided for. Still more important was the clause which rendered it necessary to obtain a sheriff's order, proceeding upon the report of a medical person, before a lunatic could be received into an asylum. It is surprising to think that not until the year 1815 were such necessary regulations enforced by law. Before this, unfortunate indeed must have been the condition of the poor lunatic, or alleged lunatic—deprived of his liberty without even a medical report or judge's warrant, and sent to an establishment the doors of which were closed against all who could assist him, and where he might fall a victim to ignorance and perhaps brutality.

But this Act had obvious defects. In particular, it applied (sec. 17) only to private asylums. Public asylums might be visited by the Sheriffs, but at their own discretion. Of course there was not so much danger of abuses in large institutions kept prominently before the public; but still there was danger, and that they should have been allowed to receive lunatics without judicial authority proceeding upon a medical report was certainly objectionable. The Act was also obviously defective in the machinery for carrying out its provisions—a machinery which has been elaborated by various statutes since. There were no paid inspectors specially devoted to this delicate and difficult work, no satisfactory regulations for the conduct of madhouses, such as the provision of registers, which could assist the inspectors who did visit. The classes of dangerous and criminal lunatics were entirely overlooked. This Act remained, as it was, in operation until 1828, when it was amended by 9 Geo. IV. c. 34. It is evident that the practical defects of the

previous statute had by this time become obvious; for this Act extended the provisions relating to warrants for reception, and the regulations as to inspection, to public hospitals and lunatic asylums. The Sheriffs became bound to inspect them in the same way as private houses, and had to grant warrants for admission into all kinds of madhouses. Books had also to be kept in licensed houses for entering the time of admission, death or discharge of insane persons, specifying the state of mind at death or discharge, and the cause of death. Special entries had also to be made of any exercise of coercion or restraint, setting forth the nature and cause of such restraint. Resident surgeons were rendered essential in such houses as accommodated more than one hundred lunatics, and provisions made for the frequent visits of surgeons to smaller establishments. The former Act had not applied to the case of a single lunatic being confined in any house, unless his confinement was for gain or reward; but now it was rendered necessary (except in the case of relatives), before any lunatic could be received, to obtain an order and certificate by two medical persons, which had to be transmitted to the Sheriff, and annual evidence afforded to the authorities of the state of the lunatic.

The law was still further amended by the Act 4 & 5 Vict. c. 60. It imposed heavy penalties upon those who sent without authority lunatics to asylums, or received them when so sent. It provided for the intimation to the Sheriff of the death of every lunatic in licensed madhouses, and for the transmission yearly to him of a register setting forth all the particulars relating to the inmates. In this Act first appear provisions for the case of a dangerous lunatic, calling for the interference in the public interest of the Procurator-Fiscal. Power was given to the Sheriff to commit to an asylum any lunatic charged, at the instance of the Procurator-Fiscal, with "assault or other offence inferring danger to the lieges."

All these Acts were repealed by 20 & 21 Vict. c. 71, which has since been considerably altered and amended by more recent statutes. The Act 20 & 21 Vict. c. 71, contains no less than 114 clauses. It provides—(1) A machinery for the general control and management of asylums throughout the country; (2) for the admission of lunatics to such asylums; (3) for the protection of the property of lunatics; (4) for the liberation of lunatics. It deals also with the cases of dangerous and criminal lunatics. This Act (sections 4-21) established the General Board of Lunacy for Scotland—at first appointed for five years, but permanently established by 25 & 26 Vict. c. 54, sec. 25. This board consists of five commissioners, two paid and three unpaid, with a secretary. To them has been given the superintendence and management of all asylums, public and private. They may institute necessary inquiries, and the two paid commissioners have to visit twice a year all public, private, and district asylums, and houses in which lunatics are detained by order of the Sheriff, and are bound to make a minute

inquiry into everything relating to the state of the inmates. They are also directed to visit lunatics in prisons and poorhouses. The powers of the commissioners are set forth in the 9th section, and their duties in the 17th, 18th, and 19th.

Sections 27-33 relate to the granting of licences for asylums, a duty devolved upon the board. There should be read along with these sections 3 and 4 of the Act 25 & 26 Vict. c. 54, under which the board have power to license lunatic wards in poorhouses, and sanction the reception of pauper lunatics into them without the order of the Sheriff. Under section 5 the board have power to grant special licences for the reception in houses of not more than four lunatics. Licences may also be granted by section 7 to charitable institutions for imbecile children. See also section 1, 21 & 22 Vict. c. 89. One very important feature of the Act 20 & 21 Vict. c. 71, was the establishment of *district asylums*, fixed according to the needs of the country, and vested in district boards. See sections 49-70 and 72-80. Where a district board failed to take the proper steps to provide accommodation, the Lunacy Board were, with the sanction of the Secretary of State, to apply to the Court of Session for the appointment of a person, who was to have the powers and duties of the district board relative to the providing of such accommodation. Such application is authorized by section 9 of the Act 25 & 26 Vict. c. 54. Sections 9-12 of that Act relate to district boards. Such district boards fall now to be appointed in terms of section 61 of the Prisons (Scotland) Act, 40 & 41 Vict. c. 53.

The principle we have seen given effect to by the previous legislation was, that no person should be put into an asylum without some evidence of his condition, and an order or warrant obtained from a competent judge. The 34th section of the Act 20 & 21 Vict. c. 71, providing for the admission of lunatics by order of the Sheriff upon medical certificates, has been repealed, and section 14 of the Act 25 & 26 Vict. now regulates such admission. An order of the Sheriff within whose jurisdiction the lunatic resides or the asylum is situated may be obtained upon presenting to him a petition, of which the form is supplied by the statute, accompanied by medical certificates by two medical persons (registered) having no immediate or pecuniary interest in the asylum to which the lunatic is to be sent. These certificates must bear date within fourteen clear days next preceding that of the petition. The lunatic must be received within fourteen days after the date of the Sheriff's order, or in the case of warrants from Orkney and Shetland, twenty-one days. But a lunatic may be detained for three days in an asylum upon an emergency certificate granted by one medical man, who may be the medical attendant of the asylum, but except in the case of a pauper he cannot grant the other certificates (29 & 30 Vict. c. 51, s. 4).

The 6th section of the Act 25 & 26 Vict. c. 54, made provision

for allowing persons to enter into an asylum voluntarily. The applicant had to make a declaration before the Sheriff, and produce a certificate by a medical person, and written consent of the superintendent of the asylum to which he proposed to go. But the superintendent had to send a monthly report to the board and to the Sheriff upon the condition of the lunatic while he remained there. He was entitled to leave the asylum when he pleased unless the superintendent certified that he was dangerous. The board or Sheriff might at any time order his discharge. This section has been repealed by 29 & 30 Vict. c. 51, s. 15. Any person with the consent of a Commissioner in Lunacy may enter an asylum as a boarder, but cannot be detained for more than three days after he has expressed his desire to leave, unless certificates and a sheriff's order are obtained in the usual way.

The regulations regarding pauper lunatics are to be found in sections 73-79, 95 and 112, of 20 & 21 Vict. c. 71, and section 8 of 25 & 26 Vict. c. 54, and 29 & 30 Vict. c. 51, s. 8-11.

A pauper lunatic is maintained at the expense of the parish of his legal settlement at the time of granting the order for his reception into the asylum, and he has to be sent to the asylum for the district in which that parish is situated. This provision applies even when the settlement is derivative, and that settlement is fixed at the time when the confinement commences. Thus if a married woman, whose derivative settlement is that of her husband in the parish of A, becomes a lunatic and is confined as a pauper lunatic, A continues liable for her support, although during her confinement her husband loses his settlement there, and it may be acquired one elsewhere (*Palmer v. Russell*, Dec. 1, 1871, 10 Macp. 185). The parish of settlement is liable in the expense attending the taking and sending the pauper to the asylum. Whenever the expenses so incurred cannot be recovered from the relatives of the lunatic or from his estate, he is to be viewed as a pauper, and the parish becomes responsible. When the parish of settlement cannot be ascertained, the parish from which the lunatic was sent is liable in the first instance, having its right of relief. Inspectors of the poor are bound, under section 112 of 20 & 21 Vict. c. 71, to give notice to the chairman of the parochial board (who reports to the Commissioners of Lunacy) the name and residence of all pauper lunatics within the parish, and the Board of Lunacy may interpose to secure the removal of such lunatics to asylums when the parochial authorities fail to do so. Pauper lunatics discharged on probation remain subject to the inspection of commissioners during the period of probation, and cannot without their sanction be struck off the roll during that period. A parochial board may obtain the discharge and removal of any lunatic unless the superintendent of the asylum opposes, but he still remains subject to the control of the board, who are entitled to know the place to which he has been removed, and may order him again to be sent to an asylum.

Section 81-84 of 20 & 21 Vict. c. 71, relate to the protection of the property of lunatics. When the property of a lunatic is not under the management of a judicial officer, or being so, is mis-managed, the board or the accountant of the Court of Session may report to the Lord Advocate, who may apply to the Court for an investigation, and when necessary, the appointment of a factor. The expenses can be recovered out of the estate of the lunatic. The care with which the law will view all that may affect the interests of this helpless class of the community is to be seen in the 84th section, which provides that the accountant of Court shall, before any caution is taken for a judicial factor upon the estate of a lunatic, give his approval.

Under section 17 of 29 & 30 Vict. c. 31, the board may obtain from the accountant of the Court of Session the names of all lunatics having judicial factors, and particulars regarding their estates; and they may apply to the Court to order such inquiry as they may think necessary. We have seen that a person who has gone voluntarily into an asylum may obtain his own liberation. The provisions for the liberation of lunatics sent to asylums under an order of the Sheriff upon petition are contained in sections 92 and 93 of 20 & 21 Vict. c. 71, and 16 of 25 & 26 Vict. c. 54, and 29 & 30 Vict. c. 52, s. 9-12. Any person having the certificate of two medical men may obtain an order for the liberation of a lunatic from the Sheriff; and the board, upon being satisfied with a medical certificate, may also order upon their own authority the liberation of lunatics. Eight days' notice in writing must, however, be given, before the lunatic can be released, to the person who obtained his detention, or to his nearest relative, or in the case of a pauper, to the party or parish by whom the expense of his detention was defrayed. Provision is made for entering in the register of the asylum the particulars relating to the liberation of any lunatic. The person at whose instance a lunatic is detained, or, in his absence, the nearest relative, or the inspector of poor where the lunatic is a pauper, may apply for his removal from one asylum to another. This is done to the board. Such persons may also apply for the liberation of the lunatic upon trial or probation; but if he requires again to be received into an asylum, there is no occasion for a new warrant and certificate. (See the provisions of 29 & 30 Vict. c. 51, s. 10-12.)

It remains to say something regarding dangerous and criminal lunatics, whose detention is at the instance of the authorities and in the interest of the public. We have seen that the first statute to deal specially with this class was that of 4 & 5 Vict. c. 60. Section 85 of 20 & 21 Vict. c. 71, empowered the Sheriff to commit dangerous lunatics, but it has been repealed by section 15 of 25 & 26 Vict. c. 54. That section deals with the cases of (1) a lunatic apprehended charged with assault or other offence inferring danger to the lieges; (2) a lunatic found in a state threatening danger or

offensive to decency. Application may be made to the Sheriff, who is to order intimation by advertisement, and a special notice to the inspector of the poor of the parish liable, of the fact that he is about to inquire into the state of the alleged lunatic. If no steps are taken by the inspector of the poor for the custody of the lunatic, the Sheriff makes an inquiry, and may commit the lunatic to an asylum, there to remain until caution is found for his safe custody. The applicant may recover his expenses from the inspector of the parish within which the lunatic has been found at large. It has been decided that under the Act 20 & 21 Vict. c. 71, the Sheriff had no power, in disposing of the commitment to safe custody of a dangerous lunatic, to find the parish liable in his maintenance *ad interim*, or decern for the expense of his apprehension (*Beattie v. Gemmel*, January 24, 1861, 23 D. 386). Such power has, however, now been given by the section under consideration. The opinion has been expressed that the parish in which a dangerous lunatic is apprehended is the parish in and from which he is taken and sent (*Beattie v. Gemmel*, February 4, 1862, 24 D. 431). These provisions for the apprehension and detention of dangerous lunatics apply to all persons, whether paupers or not, belonging to this class (34 & 35 Vict. c. 55, s. 8).

If at the time when the discharge of any lunatic is sought, it appears to the superintendent of the asylum that such lunatic is dangerous, he may in the meantime detain the lunatic, and communicate with the Procurator-Fiscal, who, if he thinks fit, may take proceedings to secure the public safety (29 & 30 Vict. c. 51, s. 12). The 19th section of this Act enables the Sheriff, upon the certificate of two medical men approved of by the Fiscal, to authorize the discharge of any person detained as a dangerous lunatic.

There are various provisions for the safe custody of criminal lunatics. Section 87 of the Act 20 & 21 Vict. c. 71, deals with cases where the insanity is pleaded in bar of trial. The accused is to be kept in custody under an order of the Court until her Majesty's pleasure be known. Section 88 provides for the event of a verdict being returned finding that the accused was insane at the time of committing the offence. A similar order of Court is to be pronounced in such cases. For the form of verdict and sentence applicable, see case of *Wylie*, 30th September 1858, 3 Irv. 218. Along with these should be read section 2 of the Act 34 & 35 Vict. c. 55, which enables the Crown to renew and vary any orders proceeding from it, and authorizing the conditional liberation of the person in custody. If the conditions upon which liberty has been conferred are violated by him, the Principal Secretary of State may by warrant cause his apprehension. Under section 89 of 20 & 21 Vict. c. 71, when a person in prison, either upon a criminal charge or as a debtor, or undergoing punishment, showed symptoms of insanity, the Sheriff, with the assistance of two medical men, had to inquire into his case, and report to the Secretary of State,

who had power to order his removal to an asylum. His release from the asylum took place under a similar procedure. Under section 6, however, of 34 & 35 Vict. c. 55, the Sheriff may himself order the removal of any person confined in a local prison to an asylum, if he is duly certified to be insane. This is done upon the application of the administrators of the prison.

The governor of a prison is bound, under the recent Prison Act, to announce to the visiting committee without delay any case of insanity or apparent insanity arising amongst the prisoners. (See section 52.)

We have thus, without entering into detail, gone over the leading provisions of the Lunacy Statutes. That much has been done at once to prevent improper confinement upon the plea of insanity, and to secure the comfort of the insane themselves, there can be little doubt. That there is room for still further improvement is the opinion of at least one eminent authority upon the whole subject—our esteemed Commissioner in Lunacy, Sir James Cox, who has recently made his views public in the shape of a pamphlet, to which we must refer our readers.

THE TERRITORIAL WATERS JURISDICTION BILL.

To the contemplative landsman, loitering along the shore, it may not seem a very practical question to what precise line out there upon the azure sea the Queen's authority and the jurisdiction of her judges may be stretched. One can easily understand that the Firth of Clyde, the Sound of Mull, or any one of the great sea lochs or bays of the Western Highlands, must be treated as part of the territory or realm of Scotland. With North Berwick Law on the one side, Fife Ness on the other, and the Isle of May lying in the middle, the nation has obviously entered into a very complete and satisfactory state of possession of the Firth of Forth. Indeed, these openings used to be called the King's Chambers. But when you stand, for instance, on the barren and lonely rocks of St. Kilda, face to face with the long rollers of the Atlantic, does it not seem a somewhat idle speculation to ask where territorial water ends and where high sea begins? The "wilderness of waters" mocks at the idea of sovereign power: there can be no proprietor for "the blue, the fresh, the ever free."

The question was, however, raised in a very definite and practical form in the great *Franconia* case last year (L. R. 2 Exch. Div. 63), and it has now again been brought under public notice by the Lord Chancellor's Territorial Waters Jurisdiction Bill, which was recently read a third time by the House of Lords. In the *Franconia* case, it will be remembered, a German vessel carrying mails from Hamburg to the West Indies, when about two miles from

Dover pier-head, ran into and sank a British vessel, the *Strathclyde*. Ferdinand Keyn, the officer in command of the German vessel, was convicted at the Central Criminal Court of the manslaughter of Jessie Young, a passenger on board the *Strathclyde*, and this manslaughter was said to have been committed on the high seas and within the jurisdiction of the Admiralty of England. The Court for Crown Cases Reserved, however, found by a majority of seven judges against six that the Central Criminal Court had no jurisdiction in the matter, because under a statute of Henry VIII. that Court only succeeded to the jurisdiction of the Admiral, and the Admiral had no jurisdiction to try offences committed by foreigners on board foreign ships, but, so far as the high seas were concerned, his jurisdiction extended only to English subjects. The minority of the judges held that the sea within three miles of the coast of England is part of the territory of England, and that the English criminal law was therefore to be applied to offences committed within that limit, whether by foreigners or by British subjects. In the end, therefore, Keyn, who by gross neglect of duty had caused a great disaster, was allowed to go unpunished, and although he was subsequently convicted in his native country, this result was undoubtedly inconvenient and mortifying to our national dignity.

The difficulty of the situation is that foreigners owe no allegiance to British law unless they come into Britain, and so the Chancellor has now come to the rescue of offended justice with a Bill "to regulate the law relating to the trial of offences committed on the sea within a certain distance of the coasts of her Majesty's dominions." This is a highly characteristic specimen of English legislation. Let there be no new coat if human ingenuity can devise a sufficient patch upon the old one. The Crown is constantly granting leases of salmon-fishings for three miles out to sea all round the coasts of Scotland, and very bad bargains many of these leases are for the tenants. This looks like a right of property, and as regards Scotland it is supported, not indeed by the leading case of *Sammel* (3 M'Q. 419), but by the well-known passage in Craig: "*Quod ad mare attinet, licet adhuc ita omnium commune sit, ut in eo navigari possit, proprietates tamen ejus ad eos pertinere hodie creditur, ad quos proximus continens, adeo ut mare Gallicum id dicatur quod litus Gallie alluit, aut ei proprius est, quam ulli alii continenti. . . . Ita ut Reges inter se quasi maria omnia dividerint, et quasi ex mutua partitione alterius id mare censeatur, quod æteri propinquius et commodius est: in quo si delictum aliquod commissum fuerit, ejus sit jurisdictio qui proximum continentem possideat; Isque suum illud mare vocat.*" But the Lord Chancellor will not say that the adjacent sea is part of the realm. That would be plain enough, but it might be held to justify the recently expressed alarm of the *North German Gazette* that England was claiming a right to stop merchant vessels on the international waterway of

Dover. In the good old times of Charles I. the learned Mr. John Selden astounded the Dutch fishermen and their lawyers by writing a book to show that the whole of the narrow seas as far as Norway were part of the territory of England. That ridiculous claim has long been given up. It was superseded by the "three miles zone" which Bynkershoek first suggested in 1702, and which has since become a pet dogma among the text-writers on international law. "*Quousque tormenta exploduntur*," said Dr. Bynkershoek: as far as your cannon will carry; the authority of the land ceases with the power of its guns. This is a very modest estimate of the range of a modern coast battery, and so the Lord Chancellor's cautious preamble explains that her Majesty's "rightful jurisdiction" has always extended over the adjacent open seas to "such a distance as is necessary for the defence and security of her Majesty's dominions." Now, jurisdiction is something much less than sovereignty. There are various kinds of jurisdiction, dealing with different subjects; and the jurisdiction here affirmed, of whatsoever kind, is only such as is required for certain purposes. The purposes for which jurisdiction has been previously exercised are well known. The Foreign Enlistment Act, the "Hovering" Acts, the Customs Acts, the Merchant Shipping Acts,—all these abound with illustrations. To protect neutrality or the revenue or the navigation, Parliament has often legislated against foreigners as well as subjects; and its right has never been disputed, because all other civilized governments exercise the same right. Then, what is more common than treaties between sovereign Powers regulating the fisheries round their respective coasts? But it is quite a new thing to say that this jurisdiction for State purposes includes a jurisdiction to punish private offences committed by foreigners anywhere within an undefined circle of territorial water. It is right to claim such a new jurisdiction: let us hope it will be exercised with discretion. But the Lord Chancellor scarcely makes out a case when, differing from Sir Alexander Cockburn, he attempts to show that what his Bill is intended to create really existed long ago.

Shortly stated, the Bill says that if a foreigner commit an offence on the open sea within one marine league of low-water mark, even though it be on board a foreign ship, this offence is to be within the jurisdiction of the Admiral, but no proceeding shall be taken without the consent of a Secretary of State. An offence is declared to mean an act, neglect, or default, which if committed in an English county would be punishable by indictment according to English law. And the jurisdiction of the Admiral is said to include the jurisdiction of the Admiralty of England and Ireland. But what has become of Scotland? She also had an Admiralty Court, the jurisdiction of which was not destroyed by the 19th article of the Treaty of Union. The prize jurisdiction under the Restraining Acts during the American War of Independence was of course confined expressly to the English Court (see *Monro v. Jackson*,

December 18, 1778, Morr. 7522); but besides the Scottish Admiralty there was, and is, the wider and supereminent jurisdiction of the High Court of Justiciary, which is certainly competent to the trial of every offence committed in waters belonging to Scotland. And why is English law to furnish the sole test and definition of offences committed on all the territorial waters of the empire? Scotland has a rational and elastic criminal law which might well be consulted in the matter. Mauritius is governed by the Code Napoléon; and India has a Penal Code of her own. Again, the Lord Advocate of Scotland has hitherto advised her Majesty whether or not a criminal prosecution should proceed in Scotland. No reason whatever has been stated why he should in this case be relieved of a duty which he has never failed to discharge with prudence and with dignity.

Correspondence.

PUBLIC PROSECUTOR AND SUPERINTENDENT OF POLICE.

(*To the Editor of the Journal of Jurisprudence.*)

EDINBURGH, 2nd April 1878.

SIR,—In the last number of your *Journal* you have done me the unexpected honour of noticing in complimentary terms a letter I recently addressed to the Lord Provost, Magistrates, and Town Council on the proposed disjunction between the offices of public prosecutor and superintendent in the Edinburgh Police Court.

My communication was a day or so too late for the purpose I had in view. It was intended as a contribution to a discussion which seemed to be imminent on a question which you and I are agreed in considering important, however we may differ as to its true solution. Discussion in public there was none. Discussion in private there may have been. I do not know who maintained there my side of the question. I was not consulted; and after previous experience, I had no reason to expect that I should be. Right or wrong, the change was an act of authority pure and simple.

I shall watch with interest the discussion which you promise in the pages of your *Journal*. Let me meanwhile make a mild protest. Your readers will naturally think that you have printed my letter in full. You have not done so; nor were you under any obligation to do so. Perhaps you have given me too much of your valuable space. But as the excisions are large and numerous, it would have been as well to indicate them in the usual manner by a few points, thus I should then have been relieved from a charge of extraordinary abruptness of style to which your procedure

has exposed me. Naturally I think the omitted passages are important to my argument. But I do not insist on that point.

Your criticism contains this passage: "It is absurd to say that evidence can be better led by a police superintendent than by a properly-qualified prosecutor." Of course it is absurd to say so if the one has the qualification which the other lacks. But that absurdity is no utterance of mine. My contention is that no man should be police superintendent except one who, besides his other qualifications, is a properly-qualified prosecutor; just as no man should be an officer of artillery or engineers who to a military qualification did not add a scientific one. What the "executive efficiency" of a constable may be who does not know whether or not he commits an illegality in arresting A. B., it is not easy to see. Hence the value of "legal drill," as I call it, to men who are officers of the law, and who in a public disturbance represent the law. They should know a little of that which they represent.

You hint a doubt as to whether witnesses ought to be "trained" at all. Pardon my saying that there is surely here some confusion of idea. No one thinks that the ordinary witness brought by the accidents of relationship or circumstance into connection with the facts under inquiry should be "trained." In this place the word is only susceptible of a bad meaning. But a skilled witness ought to be trained not merely how to observe facts, but how to report them distinctly and fully by his answers to questions in a court of justice. Now, in my opinion, the constable is, or ought to be, a skilled witness.

Years ago I remember being amused at the indignation expressed by Lord Justice-Clerk Hope at an unhappy constable who, in his evidence, happened to speak of "the case." The legal phrase filled his Lordship with indignation. "The case!" he cried; "what do you mean, sir, by *the case*? What have you to do with *the case*?" I sometimes think that an intelligent policeman, well up in his legal duties, is not the man we want. We like to have a man who makes blunders in order that we may have the pleasure of bullying him in the witness-box. A criminal trial without an ignorant or stupid policeman is an imperfect performance. We need him as we need his representative in a harlequinade.

The Hon. A. D. Elliot says in the passage from his pamphlet which you quote, "The profession and attainments of a policeman are quite different from those of a prosecuting solicitor." That is the very thing of which I complain. That is the very *lacuna* in the education of superior officers of police which I want to be supplied. The police ought to be a great public force in which men of superior attainments and education might be induced to serve, and for which there ought to be a special training, including a knowledge of criminal jurisprudence. Mr. Elliot's remaining objection is sufficient against the arrangement which once prevailed in Edinburgh of making the Superintendent to be also the Judge

of Police. I agree with him, in that sense, that a Superintendent of Police ought to have nothing to do "with the trying of criminals." But do what you like, you cannot prevent a prosecutor from taking an interest (within bounds a legitimate interest) in the success of a prosecution, more especially if he be a prosecutor only. Open discussion before a fair tribunal is the only possible check to excessive professional zeal in this direction. My contention is that a prosecutor in a Police Court who is also superintendent finds in his responsibilities as superintendent a considerable counterpoise—not a stimulant—to his zeal as prosecutor.—I am, etc.

FREDERICK HALLARD.

[We are obliged to the learned Sheriff for the above letter. We may explain, however, that the version of his former letter which appeared in our pages was taken *verbatim* from one of the daily papers—an unsafe guide, we admit—and we were not aware that any passages had been suppressed. Although we think that in this instance the municipal authorities have come to a correct conclusion, we are certainly of opinion that they might have consulted those whose opinion would have been of much greater value than their own; but this was too much to expect of a corporation. Without entering in the meantime into a detailed reply to our learned correspondent, we may note one or two points on which we are at variance. No doubt the officers of the law should know a little about what they represent, that is to say, a policeman should know "whether or not he commits an illegality in arresting A. B." This knowledge, however, can be derived from his superintendent, as that official certainly ought to know as much law as to enable him to instruct his officers in the duties they have to perform; but it does not follow from this that he is the proper man to prosecute the criminals when arrested. A constable may be possessed of much "legal training," and have an admirable theoretical knowledge of his profession, and yet his "executive efficiency" may be most unsatisfactory. The difficulty is not to teach a policeman *what* to do, as *how* to do it, and this we apprehend can only be done by a man who can devote his whole time to his men, knowing them individually, and developing in them, not so much legal knowledge as general intelligence, smartness, obedience, command of temper, and civility, for such things go much more to make "executive efficiency" than a mere knowledge of the law can do. We agree with our correspondent in thinking that a policeman ought to be able to make an intelligent appearance in the witness-box; we differ, however, as to the source from which he ought to draw this intelligence, and with all deference, we do not think that the learned Sheriff has proved that a policeman will learn to observe facts accurately and report them distinctly better because his superintendent happens also to be prosecutor. Surely a superintendent will do his work better if he can give his undivided attention to

looking after his men, and not be occupied half the day in performing the functions of a prosecutor. No doubt he can delegate his duties of supervision to subordinates, but that is a very different thing from personal supervision. It is possible that when the police is considered a great public force, for which special training would be required as much as for the learned professions, and a knowledge of criminal jurisprudence indispensable, then men may possibly appear who could unite the functions of superintendent and prosecutor satisfactorily. Till that time comes, however, and as matters at present stand, we are still of opinion that they are better separated. We should be glad if some of our readers in the country, who have the requisite experience and knowledge, would communicate their views on this important subject.—ED. *J. of J.*

Reviews.

Elements of International Law, by Henry Wheaton, LL.D. English edition. Edited, with Notes and an Appendix of Statutes and Treaties, bringing the work down to the present time, by A. C. BOYD, Esq., LL.B. (Camb.), etc., author of "The Merchant Shipping Laws." London: Stevens & Sons. 1878.

MR. BOYD stands in no need of the justification he pleads in the preface for giving us a new English edition of Wheaton's "Elements of International Law." The edition best known and most used in this country is Mr. Lawrence's American edition of 1863; but any one who has had occasion to consult that bulky tome, must have been annoyed by the frequency with which the text and the notes bear the same proportion to each other as Falstaff's bread to his sack. Mr. Lawrence had the merit of being well acquainted with the topics treated of in Wheaton's great work. His conception of an editor's duty, however, was faulty. He heaped together extracts from the despatches of ambassadors and ministers, resolutions of Congress, debates in the United States Senate, Presidents' messages, and conversations between diplomatists; printed them on the lower part of the page (sometimes in the proportion of two lines of Wheaton to about fifty of Lawrence), with a running commentary of his own, and called them "annotations." He further supplied an appendix, containing "extended notes" to the amount of eighty pages, followed by fifty pages of "addenda to the notes," and ending with a "supplement" of the same length, containing more notes still. Mr. Boyd, on the other hand, intersperses short original notes throughout the work, giving the gist of the information sought to be conveyed in his own words, accompanied by references when necessary. These notes, moreover, are printed in different type at the end of the relative paragraph of the text, and

the reader's attention is consequently not distracted in course of reading the text. The difference between the two methods of treatment is well illustrated in that part of the work relating to the distinction between private property taken at sea and on land. Both editors very properly refer to the Declaration of Paris of 1856, by which the leading Powers of Europe agreed to abolish privateering, and to the subsequent addition thereto proposed by the United States for the purpose of exempting private property from capture at sea. But while Mr. Boyd tells us all that is necessary in the space of half a page, Mr. Lawrence's "annotation" extends over twenty of his closely-printed pages, and turns out in the end to be a paper contributed by him to the Social Science Association of 1861. We hope that Sir John Lubbock and his friends, who have now taken up this subject, will, in mercy to their hard-worked fellow-members, hereafter consult Mr. Boyd's edition rather than Mr. Lawrence's.

All the important historical events and international questions since Wheaton's day are shortly narrated and discussed by Mr. Boyd, and the information is brought down to the latest date. In his note on the Eastern Question, for example, continuing Wheaton's history of the interference of the European Powers in the internal affairs of the Porte, Mr. Boyd gives a succinct and, in the main, correct account of the events which led to the late Russo-Turkish war. His allusion to the cause of the Crimean war, however, might have been more precisely expressed. And, we may remark, it is misleading to tell us, without further explanation, that the Andrassy Note was not accepted by the Porte. The Porte agreed to four out of the five demands urged by the Andrassy Note, and on the fifth point offered a compromise, which did not materially affect the general purpose of the note.

Wheaton having laid down what till recently was regarded as the generally-accepted doctrine of the maritime jurisdiction of a State extending out to the three-mile limit, Mr. Boyd of course finds it necessary to qualify this statement of the law by quoting and discussing the recent case of the "*Franconia*." The question of a State's jurisdiction over foreign ships of war in its territorial waters he illustrates by an account of the Admiralty Circulars and Royal Commission on Fugitive Slaves. He quotes in its entirety the project of an international declaration on the laws and usages of war agreed to at the Brussels Conference of 1874. For, as Mr. Boyd justly remarks, the rules though not binding are of value in exhibiting the ideas on the subject that prevail in some quarters, and it is convenient to have them in an accessible form. Such subjects as the neutralization of the Suez Canal, the case of the "*Huascar*," and the case of the Princess Bibesco are also discussed in the notes. The last-mentioned case (which relates to the effect of the second marriage in Germany after divorce there of a woman who had previously been married to a Frenchman

in France, where divorce is not permitted) has excited immense interest on the Continent, and has given rise to quite a literature of its own. We should therefore have expected from Mr. Boyd a *résumé* of the arguments on both sides of the question, and are disappointed he should have considered it sufficient to give Professor Holtzendorff's opinion. By-the-bye, why *will* so many Englishmen write as if they thought all foreigners were Frenchmen? In an English book a foreigner should receive either the appellation to which he is entitled in his own country, or its English equivalent. But what possible reason is there for Mr. Boyd turning Dr. von Holtzendorff into a Frenchman, and styling him M. de Holtzendorff? Should Mr. Boyd's book be reviewed in Germany, his reviewer will probably speak of him as Herr Boyd, or in simple German fashion Boyd, or perhaps as Mr. Boyd, but we feel quite sure he will never think of dubbing him Monsieur Boyd. While on this subject we may express a hope that in any future edition Mr. Boyd will be more careful about the accuracy of his citations of German works in the matter of spelling.

Mr. Boyd intercalates in Part II. an interesting chapter of his own on National Character and Domicile, in which he gives a sufficiently full and very accurate statement of the law of domicile with references to cases. This is followed by a summary of the naturalization laws of the United States and the leading European States. And the subject is completed by the series of Acts he prints in the appendix, embracing the English Act of 1870, and that of 1872, embodying and giving the force of law to the Convention with the United States permitting the renunciation of nationality, as well as the United States Naturalization Act, and the English and American Foreign Enlistment Acts.

The appendix also contains the main provisions of the treaties of 1856 and 1871 regarding Turkish affairs. Mr. Boyd might with advantage have inserted a few more of the treaties on the same subject. And he could have done so without adding to the bulk of the book, for the index (which, by the way, is an excellent one) is followed by thirty-two pages of advertisements, some of which might well have made way for more useful matter. Mr. Boyd no doubt refers us to Mr. Hertslet's "Map of Europe by Treaty," where the text of recent treaties is to be found; but that admirable work has two disadvantages. It does not contain the treaties anterior to 1815, with a few exceptions contained in an appendix, and it is so expensive as to be beyond the reach of most young lawyers.

To students Mr. Boyd's "Wheaton" will be welcome. It is about a third of the bulk of Mr. Lawrence's edition, and while lower in price than either it or Mr. Dana's, it contains all the changes on international law necessitated by the history of the additional twelve or fifteen years that have elapsed since their publication. After this there will be no excuse for students who have lost themselves in the wilderness of Mr. Lawrence's annotations betaking themselves to Klüber, Martens, or Heffter.

Lectures on Medical Jurisprudence. By FRANCIS OGSTON, M.D.,
Professor of Medical Jurisprudence in the University of
Aberdeen. Edited by FRANCIS OGSTON, junior, M.D. London:
J. & A. Churchill. 1878.

NOTWITHSTANDING the number of treatises on Medical Jurisprudence which have been published of late years, there is yet room for another, especially when it comes from the pen of one who is so well qualified to treat of the subject as Professor Ogston. But besides being a really good work in itself, there is one feature in it which will render it doubly useful to the profession in this country, and that is that it pays particular attention to the system of criminal procedure which prevails in Scotland. The fact that our system differs materially from that of other countries has been, not unnaturally, lost sight of by other writers on the subject, and so their books, though containing much information and learning, are necessarily deficient in those practical details as to the conduct of a medical man in regard to points of legal practice which are so necessary to enable him to do himself justice when engaged in the investigation of the medical points in a criminal case. Professor Ogston's book is in the form of lectures, a form which, though it may have some disadvantages, is eminently calculated to attract the attention of the reader, and to interest him in the subject he is studying. Although, however, the prominence given to Scottish procedure is an important feature in this volume, the method in which crime is investigated in other countries is by no means left unnoticed, so that in whatever quarter of the world the practitioner may find his lot cast, he will be at no loss to know what is required of him in his professional capacity. Beginning with the subject of medical evidence in general, the author points out the various forms of legal procedure in criminal cases which prevails in most of the great countries of the world: he then deals with the position of the medical expert in regard to investigations, and lays down sundry rules for his guidance, both in the preliminary stages of the proceedings, and also at the trial itself. If the rules which he lays down and the advice which he gives are carefully studied by the young practitioner, we have no hesitation in saying that he need not fear to face the most searching "cross" at the hands of the most dexterous counsel.

Dr. Ogston starts the more technical portion of his work from the subject of age and sex, passing naturally to that of personal identity. Impotence and sterility are next considered, followed by defloration and rape. The kindred topics of pregnancy, delivery, and birth are then treated, and the important subject of infanticide has several chapters devoted to it. The various phases of insanity are then discussed, and this intricate and delicate subject is commented on with much learning, many excellent suggestions being given as to the examination of alleged lunatics, and the inferences to be

drawn from their conduct. Death in its medico-legal aspects is next noticed, and a very useful chapter is given on post-mortem examinations and judicial exhumations. The nature and character of wounds are then considered, and the symptoms of death by drowning, hanging, strangulation, suffocation, etc., are given in detail. Lastly, we have five chapters dealing with general toxicology, in which the subject of poisoning is treated from a general point of view, the specific action of the various individual poisons being better learned, as the editor states in the preface, from books specially devoted to this wide subject.

We have thus briefly indicated the principal contents of this volume: we are not, of course, competent to speak of it from a medical point of view, we can only say that we have found it most interesting and instructive reading. The legal information it contains is, with one or two unimportant exceptions, exceedingly accurate; and one of the most useful portions in the book will be found to be the appendix, where there are given forms for certificates of insanity, and for the various kinds of medico-legal reports required by the law of Scotland in criminal investigations. The illustrative cases quoted in the Lectures are many of them new and all to the point, while several plates showing in a graphic manner the various forms of wounds, malformations of the body, and the like, serve to enhance the value of the book. We have rarely seen a work which commended itself in a higher degree to the attention both of the medical man and the lawyer, and to Scottish practitioners in both professions we should say it was absolutely indispensable.

The Month.

AMATEUR LEGISLATION ON THE RIGHTS AND WRONGS OF MARRIED WOMEN.

DURING last session of Parliament an Act was passed, which was introduced into the House of Commons by Mr. Anderson, the member for Glasgow, intituled "The Married Women's Property (Scotland) Act, 1877." This statute has not had time yet fully to develop itself; and if we take the commentary, just published upon it by the Dean of Faculty, there will be some work "cut out for our Courts in ascertaining its meaning." "The Act," he continues, "unsettles everything, and settles nothing."

Certainly a cruder specimen of legislation was never added to the Statute-Book. It is not, however, with that statute, but with a new attempt of Mr. Anderson in the way of legal reform, or rather destruction, with which we mean at present to deal. He has

introduced into the House of Commons, during this session, a Bill, to be called "The Married Women's Property (Scotland) Act, 1878," which proposes to abolish the whole law of husband and wife in reference to property, and to place such persons in the position apparently of two independent partners, each having control over his or her own properties, with the whole burdens and responsibilities left upon the unfortunate husband.

The Bill is a jumble of English and Scottish law, and uses language which, as applicable to Scotland, is totally unintelligible. The first section of it sweeps away the entire common law of Scotland, in regard to the husband's powers over the wife's personal estate. It is in the following terms: "(1) No personal or movable estate or money pertaining to a married woman at the time of her marriage, or acquired by her during marriage, shall be subject to the *jus mariti* and right of administration of her husband, unless and until the same is reduced into the husband's possession; and any such estate or money, whether reduced into the husband's possession or not, may be secured to the separate use of the wife by investing the same in the name of the wife upon heritable security, or in any of the modes hereinafter specified."

At present, when a woman marries, her personal estate falls into what is called the *communio bonorum*, which is managed and disposed of by the husband. The laws of all countries have deemed this a fitting and an expedient rule; and as a consequence the husband is the person bound to pay the debts of both parties, and upon him rests the burden of maintaining the common family. It is now proposed to take this power from the husband, and to continue upon him the burden. A wife is to be allowed to retain all the property which she possesses at marriage, and all the property which she may acquire during marriage, if the husband does not "reduce it into possession" (whatever that means). And whether reduced into possession or not, it may be secured to her by investment. She may deal with the funds so protected as she thinks fit. She may squander them in any sort of extravagance she pleases, and maintain a separate establishment if such be her will; and she cannot be compelled, according to this Bill, to contribute one single sixpence towards her own maintenance, or the support and education of the children at whose procreation she assisted.

Now all this may be quite right, provided we are prepared to overturn the very constitution of domestic life, and to run counter to the common law of all civilized states. That there are exceptional cases requiring exceptional remedies, no one will dispute; but we are not surely going to make our medicine our daily bread. These cases have been already provided for by the "protection orders" and the "Equity to a settlement" authorized by the Conjugal Rights Act, 1861; and what good is to be attained by the creating, in every household, two independent interests, it is not very easy to understand. The ground upon which the husband, in virtue of

his *jus mariti*, acquires all the wife's personal estate, has always rested upon this, that he lies under the correlative obligation to maintain the wife and the common household. All this, however, is entirely ignored in this Bill, and the consequence will be, if it becomes law, that husbands will be compelled to protect themselves by special stipulations in their favour in antenuptial contracts.

We have said that the Bill is neither English nor Scottish in its terminology, for it is a mixture of both. The person who drew it found, in the English law, the phrase, as applicable to husband and wife, of "reduced into possession," and forthwith proceeded to adopt it, without apparently any clear apprehension of its meaning. In the English law it is applied to the wife's *choses en action*, and simply means that if the husband does not obtain payment of bills, or promissory notes, or similar rights due to the wife, while the marriage subsists, the right to these survives in the wife if the husband predecease her. The rule has no application except to *choses en action*. But, according to the present Bill, it is to be made applicable to all kinds of personal property belonging to a woman. And further, it is supposed, we are to have the same dreary experience and litigation which they have had in England, as to what "reducing into possession" means.

The second section of the Bill is in the following terms: "(2) Sections three, four, five, and six of the second-recited Act¹ shall apply to Scotland; and all estate or money invested in terms thereof, for the separate use of a married woman, shall be held by her exclusive of the *jus mariti* and right of administration of the husband of such woman, or of any husband whom she may thereafter marry."

The first remark that we have to make on this section is, that if we are to have the law of Scotland turned upside down, we ought at least to have it made very plain, by substantive enactment, what are the new rules by which domestic affairs are to be regulated, without being sent to an English statute for clauses which have been framed entirely with reference to the English law.

The third section of this English Act which is thus to be incorporated, tells us that a married woman "may apply to the Governor and Company of the Bank of England, or to the Governor and Company of the Bank of Ireland," to the effect that any sum of money, not less than £20, to which she is entitled, shall be entered in her name in the books of these two banks, and the fund shall then be held to be her separate property. This enactment is very hard for the Scottish banks. Why should a Scottish woman not be entitled to apply to the Bank of Scotland or the British Linen Company to take in her money, and why should she be obliged to go all the way to London or to Dublin to have protection from her natural enemy—her husband? Then we next want to be informed

¹ "Married Women's Property Act, 1870." This Act is declared by sec. 16 "not to extend to Scotland."

how long this money is to remain separate estate, and if she can withdraw it at pleasure without the consent of the bank?

We next come to the fourth section of this English Act, which says that a married woman may get her name registered as a shareholder in a joint-stock company if the stock be her separate estate; and section five applies the same rule to shares in any industrial and provident society, or friendly society, or benefit building society, or loan society.

We are not aware that these latter enactments were necessary under the existing law, for undoubtedly a woman possessed of funds exempt from the *jus mariti* and right of administration, may invest the same in any stocks or shares she pleases. But the peculiarity of the case is this, that although the husband may have got the wife's funds "reduced into possession," and spent them all in a fair and honest way in supporting his wife and children, yet under the first section of this Bill, the wife is entitled to insist upon the unfortunate gentleman paying up every farthing of it, and investing it on heritable security, or putting it in the Bank of England or the Bank of Ireland (but not the Bank of Scotland), or in stocks or shares of companies or societies, all to be held for the wife's separate use.

The third section of this Bill is in the following terms: "(3) Where any woman married after the passing of this Act shall, during her marriage, become entitled to any personal estate as next of kin or one of the next of kin of an intestate, or to any sum of money destined to her under any deed or will, such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to the woman for her separate use, and exclusive of the *jus mariti* of any husband whom she has married or may marry."

In other words, this is simply saying that any legacy or intestate estate bequeathed to the wife, or to which she succeeds, shall be her own absolute property, and this too without any reference to "reducing into possession." At present she can claim the "Equity to a settlement" out of such legacy or estate, the amount of which is determined by the Court according to the circumstances of each case, and according to the peculiarities of the particular family. So far as we know, this provision of the Conjugal Rights Act has worked well, and the alteration now proposed, is demanded neither by expediency or justice, if the law be as it at present stands, that the husband is the burden-taker of the household. The fourth section of the Bill carries out the same views in reference to the rents of heritable estate, which are no longer to fall under the *jus mariti*, but to form the absolute property of the wife. The last clause of the Bill tells us that any question arising in regard to the subject-matter of the Act may be heard in the Court of Session or in the Sheriff Court, which, perhaps, is an unnecessary piece of information, seeing that these Courts are the only Courts appointed by law for the trial of such questions.

Such are the provisions of this new Bill for the protection, or the elevation, or the amelioration of a down-trodden class of the community. If it be necessary to reverse the legal incidents of the married relation, certainly let us do it; but let it be done by some measure which displays knowledge of the subject, and a comprehensive appreciation of the consequences of the change. Disguise it as you may, the existing state of things is the result not of human legislation but of nature's will. Womankind in the mass are, and must be, for all material advantages, for protection and personal security, dependent upon men, whether the latter be styled "lords and masters" or "tyrants and oppressors;" and in no relation is this dependence upon one side, and protection on the other, more marked, more real, or more natural than in that of marriage. The whole character of this union would be lost, most of its purposes defeated, if any law interfered to change this mutual relation, and to substitute an express recognition of theoretical independence and equality in favour of the wife. The husband is no doubt *dominus bonorum*, and his powers are great, because his liabilities are unlimited. He is accountable to his wife's milliner, for the payment of her servants, her coach hire, her other luxuries, to say nothing of the maintenance and education of her children. Change this law, and the result will be the cohabitation of male and female, each with separate fortunes, separate expenses, separate bills, separate liabilities; each pursuing separate actions in Court for his or her own independent interests—the husband going to jail, while the wife is riding in her carriage; or the wife similarly impounded, while the husband is living in luxurious freedom. Is it necessary for the protection of the few isolated cases of women linked with drunkards, gamblers, or debauchees to enact laws which experience proves would be futile for good, and which would involve the certainty of sowing jealousy and discord wherever they were put in force? The proposed overthrow of the common law would not result in the wife's practical independence. There is nothing to prevent a wife at her pleasure handing over to her husband all her separate estate, or assigning it for the benefit of his creditors, as was decided in the *Standard Property Company v. Cowe*, 4 Rettie, 695. The truth is, all laws and all schemes are clumsy when arrayed against the instincts of conjugal affection or the sympathies of conjugal confidence. No law can constrain the tribute of a woman's love, or forbid the offering of a wife's devotion. If it ever should prove otherwise, this would be because brutality on the one side, or heartless selfishness on the other, has proceeded to that exceptional extent which cannot be reasoned on as a basis for general legislation.

Appointment of Chief Constable of the United Counties of Edinburgh and Linlithgow.—Captain David Munro of the Madras Staff Corps has been appointed Chief Constable of the above

counties. Captain Munro is at present Chief Constable of the Isle of Man, an office which he has held since 1874. He entered the late 43rd Madras Native Infantry in 1857, and served in it till 1868, when he was put on the Staff, on which he continued till 1871. We understand that there were upwards of seventy applications for the post to which Captain Munro has now been elected, one being from a Baronet, and four from "Honourables." It is gratifying to see what a high and much-sought-after position the office of Chief Constable of our counties is now becoming.

It will be observed from our advertisements that Mr. J. P. Coldstream, W.S., A.C.S., intends to deliver a short course of lectures on the Law and Practice of the Court of Session, for the benefit of those who are going up for the next Law Agents' Examination. We believe that these lectures have been found very useful by previous intrants, and that Mr. Coldstream treats his subject with ability and clearness.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF SHETLAND.

Sheriff MURE.

LAURENSEN v. HAY.

Held in a case of aliment for an illegitimate, that the sole evidence of the pursuer uncontradicted was not sufficient to establish the paternity.

The circumstances of this case are sufficiently disclosed in the following interlocutor and note. There was no appeal :—

"*Lerwick, 1st February 1878.*—The Sheriff-Substitute having heard parties, and having considered the record, evidence, and productions, finds in point of fact (1) that the pursuer became a servant of the defender at the term of Candlemas 1876, and lived in his house in that capacity for about the period of six weeks; (2) that the pursuer depones that about three weeks after she went to his service the defender had carnal connection with her in the barn adjoining his house when she was thrashing corn there; (3) that she depones he had again connection with her in the same place and circumstances about a week after the first occasion; (4) that the pursuer gave birth to an illegitimate female child on the 22nd December 1876, of which she depones the defender is the father; (5) that the defender is a married man with a wife and seven children; (6) that the pursuer's evidence is wholly unsupported by any other evidence, and that there is no other corroborative testimony, apart from the pursuer's oath of suspicious circumstances or improper familiarities on the part of the defender: Finds in point of law that the proof led by the pursuer is insufficient to prove that the defender is the father of her said child: Therefore assoilzies the defender from the conclusions of the summons: Finds him entitled to expenses: Allows an account thereof to be lodged in process, and remits the same when lodged to the auditor of Court to tax and report, and decerns.

"ANDREW MURE.

"*Note.*—This case is presented for the decision of the Court on a proof, such as has not fallen under the observation of the Sheriff-Substitute in the course of his previous experience either as a judge or an advocate. The pursuer adduced herself as a witness, and with the consent of the defender tendered a certificate by her former master of her fidelity and honesty as a servant—this is all the proof. The defender had witnesses in attendance, among whom, however, was not the defender himself, which it appears happened by the mistake of his not being informed of the diet of proof; but on observing the scantiness of the pursuer's proof he did not adduce any evidence at all but renounced probation.

"In these circumstances it is true that the pursuer's evidence is uncontradicted; that her oath is clear and unfaltering; and that if the Court is entitled to proceed in such a case upon the evidence of one witness only, decree should be pronounced against the defender.

"It is true that the admissibility of the evidence of parties in their own cause involves the introduction of considerations somewhat different from those which apply to the construction of ordinary testimony. If a party to a cause, adduced either by himself or the opposite party, were to make admissions or statements contrary to his own interests, these would be considered as regards that party as full legal proof superseding the necessity of corroborative testimony. If it were a third party who gave such evidence, it could not *per se* be so treated. But what is to be said where the *onus* of proof lies upon the pursuer, and her or his testimony is the only evidence in favour of the facts necessary to prove his or her case.

"The pursuer's evidence must be dealt with on a different principle from that above indicated when the evidence is against the party's interests. In filiation cases it has always been held that there must be corroborative proof of opportunity, of familiarity, or such suspicious circumstances as seem to point to the defender being the father of the child. The evidence of the pursuer in addition to the above is conclusive of the fact of the paternity. Though the Evidence Act (16 & 17 Vict. c. 20) put an end in practice to the procedure of *semiplena probatio*, and pursuer's oath in supplement, and introduced what may be called a converse practice of the pursuer herself, testifying to the chief facts in question, and then adducing corroborative testimony, yet the general principle of our law remains untouched, that a single witness is not sufficient to prove the fact to be established, as Stair (4, 43, 2, 3) says, "One witness cannot make sufficient probation whatsoever be the quality or veracity of that witness, and yet the testimony of one witness may produce more faith in the judges than other two will do: this evinceth that everything is not a sufficient proof that makes faith to be the judge." This has continued to be the law down to the present time: see Tait's "Law of Evidence," p. 435; Bell's "Principles," § 2257 (2). On this general principle the Sheriff-Substitute conceives that he must pronounce decree of absolvitor.

"In the present case the Court has not, as is usual since the Evidence Act came into operation, to consider on the whole evidence on which side is the balance of credibility. The oath of the defender being wholly wanting, there is no balance to be determined this way or that, by the weight of evidence predominating on the one side or the other. In this respect the case is distinguished from that of *M'Bayne v. Davidson*, July 10, 1860, 22 D. 738. Nor has the Sheriff-Substitute omitted to consider the two cases of *Grant v. Macgregor*, 20th June 1839, 1 D. 1050, and *Mackellar v. Scott*, 8th Feb. 1863, 24 D. 449, both of which cases approach in their circumstances more nearly to the present than any others in any of the Scotch Law Reports. They are distinguished from the present, however, by the fact that the defender was held as confessed, and the pursuer's evidence in addition was sufficient to conclude him. There is an element in these cases which is wholly wanting in the present, and that being so, it cannot be held that they are precedents which should determine the present case.

A. M."

SHERIFF COURT OF PERTH.

Sheriff BARCLAY.

A. B. v. HIS CREDITORS.

Law of Imprisonment in Scotland on English Debts.—A native of Scotland, with debts contracted there, for a time resided in England and contracted other debts. He returned to Scotland. Several English creditors got their debts constituted by decrees in the Scotch courts. One surly creditor put the debtor in prison, and two other English creditors lodged detainers. A sequestration of his estates was obtained by a Scotch creditor, and a trustee was appointed. The creditors did not grant nor refuse personal protection. After two months' incarceration, the bankrupt presented a petition to the Sheriff for liberation. One English creditor opposed, and the following judgment was pronounced and acquiesced in, and the bankrupt was liberated after three months' imprisonment :—

"*Perth, 15th February 1878.*—Having advised the process (the parties having renounced probation and dispensed with a hearing), for the reasons set forth in the annexed note, grants the prayer of the petition and warrant of liberation, reserving to the objector all other execution still competent under his diligence : Finds no expenses due, and decerns.

HUGH BARCLAY.

"*Note.*—The Sheriff-Substitute called the attention of the petitioner to the fact that, not having obtained a *general* protection against personal diligence under the sequestration, he was exposed to incarceration at the instance of any other creditor. It was suggested that the proper remedy would be the process of *Cessio*. But this involved both time and cost, and as the petitioner was pleased to incur the risk, the Sheriff-Substitute felt constrained to decide the case as it stood. He cannot, however, adopt the plea that because no motion was made at a meeting of creditors to give the petitioner personal protection and negatived, therefore it must be held as *granted*. What induces the Sheriff-Substitute to grant the prayer of the petition is that the objector's debt is an *English* debt. Had the petitioner remained in England, he was protected from imprisonment under the Act 32 & 33 Vict. chap. 62 (the Debtors' Act, 1869). Indeed, the objector's debt being under £50, he could not, even under the 6th section, have detained him in England until security was found to remain in England. It is a question of some importance whether the petitioner could competently be incarcerated in Scotland for an English debt. But this could only be tried under a bill of suspension in the Supreme Court.

"The objector alleges certain matters which might bring the petitioner under Part II. of the Abolition Act. Supposing that these allegations fall within these provisions (as to which there is some doubt), the matters can only be adjudicated by an English tribunal.

"It is of importance to observe that the creditors at whose instance the petitioner was first imprisoned, and one of the detaining creditors whose debts were much larger than that of the objector, though called, offer no opposition to the petition. It is stated they have uplifted their diligences, so that Mr. Green, the smallest in amount of the claims, and whose claim of £23, 17s. 6d. is one for malt liquors, is the sole objector to liberation. It is difficult to discover why this one gentleman should be the champion of the whole body of creditors and vindicator of the law of morals.

"The fact is of importance that the estates of the petitioner have been sequestrated at the instance of a Scotch creditor and a Scotch trustee appointed. In this way the funds and effects, however small, are all secured to the creditors, and the petitioner's discharge from debt placed under their sanction in the most legitimate mode. Imprisonment for civil debt is merely to ensure that the effects of a debtor are secured and fairly distributed amongst the whole creditors. It is against all principle that any single creditor, actuated it might

be by motives not always the most virtuous, can at his own hand victimize and punish an unfortunate debtor with the view either of gratifying revenge or inducing some relative to pay his single debt in preference to all others, perhaps still more honest in their contraction. The English Act draws well the line of distinction between honest and unfortunate debtors and the "punishment of fraudulent debtors," exempting the former from being exposed to any one personal and irresponsible creditor, whilst consigning the latter to the ordinary tribunals of criminal justice. It is somewhat surprising that the law which since 1869 has been found to work so satisfactorily south of the Tweed should yet be unknown in the north. It is doubted whether commercial and mercantile morality have in consequence been found in Scotland to be more generally prevalent, because each creditor has still the power of imprisoning his debtor, and that indefinitely.

H. B."

Act.—Skeete.—Alt.—Pinkerton.

APPEAL OF A. B.

A party (pursuer) employed an agent in a lawsuit in the Sheriff Court of Perth. The pursuer was successful. The case was appealed to the Court of Session. The pursuer became bankrupt during the dependence of the case. The trustee on his sequestrated estate sisted himself. The judgment of the Sheriff was reversed and the defender assolizied, and the trustee found liable in costs. The pursuer's agent sought to be ranked *preferably* for his account on the ground that the trustee had taken advantage of his agency in the Sheriff Court process. The trustee refused the *preference*, but admitted the claim as an *ordinary* creditor. The agent appealed, and the appeal was dismissed according to the following interlocutor and note :—

"*Perth, 12th March 1878.*—Having heard parties' procurators, and made avizandum with the proceedings and debate, for the reasons set forth in the annexed note, dismisses the appeal, affirms the judgment of the trustee, and decerns in his favour against the appellant for one guinea of expenses.

"HUGH BARCLAY.

"*Note.*—The facts are few and simple, but the judgment sought by the appellant is novel, and no direct authority has been shown to support his contention.

"The appellant was agent in a Sheriff Court process, and in the end of which he was successful. But on an appeal the judgment of the Supreme Court was adverse. Whilst the case was in the Supreme Court the pursuer, his client, became bankrupt, and the trustee in the sequestration sisted himself as a party. Costs were awarded by the Court against the trustee. The appellant lodged his account for the conduct of the case in the Sheriff Court, and claimed to be ranked as a preferable creditor. The trustee has ranked him as an ordinary creditor, but refused his preference. In this the trustee appears to have judged correctly.

"The plea of the appellant is that by the trustee sisting himself he has made himself liable not only for the expenses to the opposite party, but to the appellant as agent for the bankrupt. This plea is founded on the ground that the trustee availed himself, or took the benefit of, the appellant's judicial work.

"There is an obvious distinction between an agent's claims as against an opposite party in an action and against his own client. With his client, he trusted solely to the credit of that person; with the other party, it was only in the event of his being successful that he could have any claim. If successful, he could obtain decree in his own name with some limitations. He behoves to be a law agent and not paid by his own client, and expenses awarded on the other side form good grounds of compensation. The agent, even where he has not obtained decree in his own name in the Local Court, may follow the case into the Appeal Court and obtain decree there; or where he has not obtained decree, he may interpel the party found liable in his account from paying these costs to his client to his prejudice.

"Where a pursuer has become bankrupt, and his estate has become vested in a trustee, the trustee before further procedure must sist himself as the party now solely interested, and by that act he becomes liable in costs both subsequent and prior to that act. Failing his so sisting himself, the bankrupt cannot pursue the action further, unless in some special cases, when he must find caution for costs in the same way as the trustee would have been liable. It does not follow, as in some quarters it is thought, that where it is a defender who becomes bankrupt, the pursuer is entitled, where the trustee of the defender will not sist himself or the defender find caution for costs, to decree for whatever is demanded.

"Had the appellant obtained decree in his own name, either in the Local or Supreme Court, and the trustee refused to sist himself, he might have taken up the cause for his own interest; but in such a case he would have placed himself in the position of the trustee, and so become liable to the adverse party in costs. He could not have compelled the trustee to sist himself, neither could he have prevented him doing so. If the judgment had been affirmed, the appellant would have received his costs. But the issue being otherwise, he can only be ranked as a common creditor, just in the same way as if the bankrupt had been the party to the cause throughout. In fact the bankruptcy of his client would, on the appellant's contention, have placed him in a higher position than if he had been throughout solvent. Indeed, in certain circumstances, the want of success might be of more advantage to the agent than success. The opposite party might be totally worthless, but the bankrupt estate might prove sufficient to admit his preference to his account in full.

"The appellant, in support of his contention, referred to the decision, 10th June 1873, *Rodger v. Russell*, 45 Jurist, 417. This was the case of a mutual gable. It is clear that an adjacent proprietor cannot take a benefit without the corresponding obligation. The appellant also adduced instances of a house or ship building where a trustee or a purchaser of a house or ship in process of building seeks to take the benefit of the first portion of the work without recompense. There is the analogous law of *negotiorum gestor utile*, where if a party takes the benefit of what was without his consent or knowledge done for his behoof by a stranger, he must be liable in the costs of obtaining that benefit.

"The appellant also quoted the cases of 23rd February 1849, *Forbes v. Borthwick*, 21 Jur. 231; and 21st June 1850, *Davidson's Trustee v. Carr*, 22 Jur. 469, 12 Dunlop, 1069. Both of these cases were on questions as to the liability of the trustee by sisting himself for costs to the adverse party.

"The only authority cited for the appellant which bears on the issue is 4th June 1824, *Paterson v. McClelland*, 3 Dunlop, 103. The case is very briefly reported. But as far as can be gathered from the report, it appears that the claim at issue in the original action was *finally* successful, and for the benefit of Neval (the bankrupt), *his 'trustee and his creditors.'* The trustee notwithstanding refused payment to the agent of his account contracted before the execution of the trust-deed. It will be observed that there was no question of preference. The trustee refused to recognise the agent even as an ordinary creditor, probably because the award in favour of the estate was obtained not under the law process, but under a reference.

H. B."

SHERIFF COURT OF CAITHNESS.

Sheriff THOMAS.

BARNETSON (BEGG'S EXECUTOR) v. M'BEATH.

This case arose out of a dispenishing sale, at which the defender bought a horse of which he refused to pay the price, as it is two years older than warranted to him at the sale. In an action for the price, the following interlocutors have been pronounced:—

" *Wick, 15th February 1878.*—The Sheriff-Substitute having considered the case, together with the dilatory defences for the defender, finds that the pursuer, upon the 24th day of May last, sold by public roup the mare 'Jenny' at the price of £74, 11s. to the defender : Finds that the defender admits that he has retained and worked the said mare, and still does so : Finds that the defence is irrelevant, and therefore decerns against the defender for the sum of £74, 11s. sterling, together with the interest at the rate of £5 per centum per annum from the 24th of November last, being the date of payment specified in the articles of roup produced, together with the expenses of process, as the same may be taxed by the auditor of court, to whom an account thereof is remitted, and decerns. Five words delete. HAMILTON RUSSEL."

Against this interlocutor the defender appealed, and the appeal has been disposed of as follows :—

" *Wick, 8th March 1878.*—The Sheriff having considered the defender's appeal, with reclaiming petition for him and whole process, finds that the clause of reference in the articles of roup (No. 9 of process) to the 'judge of the roup, with power to him to determine whatever questions or differences may arise between the exposer and offerers, and the offerers themselves, in relation to the premises,' founded on by the defender as excluding this action, does not exclude it, inasmuch as it is merely executorial, and applies to questions or differences arising at the roup, and does not embrace a question of warranty such as is raised by the defence on the merits here, and therefore repels the defender's first plea in law : Allows the defender a proof of his averments as to his defence on the warranty (being articles 2 and 4 of his statement of facts, both inclusive), and to the pursuer conjunct probation : Appoints an early diet for said proof to be fixed, and meantime reserves all questions of expenses. To the extent of giving effect to the above finding and order for proof, sustains the said appeal, and recalls the interlocutor submitted to review, and *quoad ultra* dismisses the said appeal, and adheres to said interlocutor.

"GEO. H. THOMAS."

Act.—Wm. Miller.—Alt.—Brims and Macdonald.

ALDER & SONS v. BREMNER.

This case arose out of the employment of the tug *Rapid* of Sunderland, hired by the defender from the pursuers for towing boats and vessels during last fishing season. The engagement was for eight weeks, or longer if required, in the defender's option, at the rate of £16 per week. The charter expired on the 11th September last. On the 10th September the defender requested the master of the tug to proceed to the Pentland Skerries to assist in saving wreck of the *H. M. M'Kenzie*, stranded there, which the master refused to do, whereupon the defender refused to supply the tug with coals for her homeward journey. The Sheriff-Substitute (Russel) gave decree in favour of the pursuers for £20, 9s. and expenses. The defender appealed to the Sheriff (Thoms), who issued the following interlocutor, which deals very fully with the whole case :—

" *Wick, 7th March 1878.*—This Sheriff having considered the defender's appeal with respondents' petition and answers, finds : (1) That the steam-tug *Rapid* was hired by the defender from the pursuers for not less than eight weeks, from 17th July 1877, and longer if required, at the rate of £16 per week, the defender to provide coals and pay port charges, and to deliver up the tug to the pursuers in the river Wear. (2) That the said tug on said 17th July was ready to sail from the river Wear for Wick, but was prevented by stress of weather from doing so until the 18th July 1877, when she left the Wear supplied with coals paid for by the defender. (3) That on said voyage from the Wear to Wick it became necessary for the said tug to call at Aber-

deen, and that port charges were incurred on 19th July for her there, amounting to 2s. 1d., which were paid by the pursuers as per receipt, No. 11 of process. (4) That the said tug arrived at Wick on or about 20th July 1877, and was thereafter ready in terms of the charter-party (Nos. 8 and 17 of process) to do all lawful service and employment as a tug during said period of eight weeks, and longer if required. (5) That the defender on 10th September 1877, and before the expiry of said period of eight weeks, ordered the master of said tug to go from Wick to the Pentland Skerries to salve a wreck which had occurred there, and that the master refused to obey his order. (6) That the salving of said wreck was not lawful service and employment within the contract of hire of the said tug, and that the master's refusal to obey the defender's said order was justifiable. (7) That the defender and pursuers had by telegraph arranged that the said tug was to leave Wick for the Wear on 10th September 1877, but the defender did not on that day or afterwards provide the coals necessary for that voyage, and that therein the defender was in default. (8) That in consequence of this default of the defender, and of the state of the weather, and other causes for which the pursuers are not responsible, the said tug was unable to leave Wick until 12th September 1877, when she set sail from Wick, and she arrived in the Wear on 15th September 1877. (9) That to enable the said tug to make the said homeward voyage, the pursuers supplied her at Wick with five tons of coals, which cost £4, 10s., as per receipt No. 9 of process, and which sum the pursuers have paid. (10) That on said homeward voyage from Wick to the Wear, it became necessary for the said tug to call at Aberdeen and that port charges were incurred there on 13th September 1877, amounting to 2s. 1d., which were paid by the pursuers, as per receipt No. 12 of process produced by them. (11) That at Aberdeen it was further necessary, in order to prosecute her homeward voyage, for the said tug to take in coals, and that the pursuers then and there supplied her with six tons, which cost £4, 1s. as per receipt No. 10 of process, and which sum the pursuers have paid. (12) That in prosecuting said homeward voyage, it became necessary for the said tug to call at Arbroath; that she did so on 14th September 1877, and that in order to prosecute the further voyage, the pursuers then and there supplied her with two tons of coals, which cost £1, 1s. as per receipt No. 13 of process, and which sum the pursuers have paid. (13) That the defender has not objected that these quantities of coal were not consumed on the said homeward voyage, and that he is liable to the pursuers in the said sum of £4, 10s. paid at Wick, £4, 1s. paid at Aberdeen, and £1, 1s. paid at Arbroath for coals as aforesaid. (14) That the defender is further liable in the port charges of 2s. 1d. at Aberdeen for said homeward voyage, besides the port charges of 2s. 1d. at Aberdeen, incurred and paid on the voyage to Wick. (15) That at the rate of £16 per week, the sum of £2, 5s. 8½d. per diem was the hire of the said tug, and that said hire became due from the said 17th July 1877 to the said 15th September 1877, both inclusive, being a period of eight weeks and four days. (16) That the defender has paid to the pursuer the sum of £128, being the hire of the said tug for eight weeks, but has not paid the hire of the said tug for the said four days over and above the said period of eight weeks, and is resting owing and indebted to the pursuers in the same, which, at the aforesaid rate per diem, amounts to £9, 2s. 11d.; and (17) That the defender is besides indebted and resting owing to the pursuers in the said sums of 2s. 1d. of port charges at Aberdeen on 19th July; of £4, 10s. for coals at Wick; of 2s. 1d. of port charges at Aberdeen on 13th September 1877; of £4, 1s. for coals at Aberdeen, and £1, 1s. for coals at Arbroath, amounting together to £9, 15s. 1d., making together, with the said sum of £9, 2s. 11d. of unpaid hire, £18, 17s. To the extent of giving effect to these findings, sustains the said appeal, and recalls the interlocutor submitted to review: *Quoad ultra* dismisses the said appeal, and adheres to the said interlocutor: Decerns and ordains the defender to make payment to the pursuers of the said sum of £18, 17s. with interest as concluded for, and of new finds the pursuer entitled to expenses, including those of this appeal, as these may be taxed.

GEO. H. THOMS.

Note.—Although the pecuniary result is slightly different, the Sheriff has arrived at it on much the same grounds as led the Sheriff-Substitute to his conclusions. The Sheriff would only add that he is satisfied that, irrespective of the letters which preceded the charter-party, and the regulations made as to the use of the tug while at Wick, the defender was not entitled to order the tug on salvage duty, and that the master's refusal to obey that order was justifiable. As there are no separable expenses connected with the slight reduction in favour of the defender, to which effect has been given by the Sheriff, the pursuers have been found entitled to full expenses against the defender.

G. H. T."

Act.—Leith—Alt.—Sutherland.

MANSON V. M'PHERSON.

The pursuer was engaged, as he alleged, to be a farm servant to the defender from Whitsunday 1877 to Whitsunday 1878. The defender, on the contrary, refused to accept of the pursuer's services after Martinmas 1878, on the ground that he was only a half-yearly servant. The action was brought to determine the question between them by a demand for £26, 4s. 9d. of wages, and for allowances:—

Wick, 5th March 1878.—The Sheriff-Substitute having considered the account libelled, pleas of parties, proof adduced, writings produced, heard parties' procurators, and advised the cause: Finds in point of fact that the pursuer was at the Georgemas Hill Feeing Market, held on the last Tuesday of the month of April 1877, engaged by Robert Bruce, the defender's grieve, as foreman upon the farm of Shorelands for the space of one year from Whitsunday 1877 to Whitsunday 1878 at the sum of £21 sterling, together with seven bolls of meal for that period, and one pint of milk per diem: Finds, because it is not disputed, that the pursuer entered upon said engagement at said term of Whitsunday 1877, and remained therein, exclusive of five weeks and three days, during which period he was laid up at home suffering from severe illness, until the term of Martinmas thereafter: Finds that the pursuer was at Martinmas able, willing, and made offer to continue his services under his engagement, but that the defender employed another man to fill the pursuer's place without his consent: Finds in law that the defender was not justified in dispensing with the services of, or terminating the engagement with the pursuer, and that the pursuer is entitled to full compensation for the period of his engagement under deduction of the sum he has *ex gratia* credited the defender for the time he was unwell. Therefore finds the defender liable to the pursuer in the sum of £26, 4s. 9d. sterling, the amount sued for, with the sum of £4, 1s. 7d. sterling of expenses, and decerns. HAMILTON RUSSEL.

Note.—The sole question in this case, as to whether or not the pursuer's engagement was for a year or for only half of that period, rests to a great extent upon the proof which has been adduced, and upon a careful consideration thereof, the Sheriff-Substitute has arrived at the conclusion that the pursuer is entitled to succeed in the action, and he has decerned accordingly. It will be noticed that the defender has only in support of his contention that the pursuer was engaged merely for the space of half a year, the evidence of his grieve, the witness Bruce, whose testimony is, however, negatived by that of the pursuer and that of the witness James Nimmie, the only mental party present when the engagement was made. It might have been better had there been two witnesses instead of one present, but this want of further corroborative evidence is to some extent supplied by the letter of the defender's grieve to the pursuer (No. 6 of process), the only sound conclusion to be deduced from which is an implied contract between the parties for a year, and that the defender was anxious to get rid of the pursuer's services in respect that he did not consider the pursuer would be able to perform the work required by him during the winter half year. This, in the Sheriff-Substitute's

view, corroborates the statement of the pursuer as to the engagement. The Sheriff-Substitute has indicated that the pursuer was entitled to a full year's wages in accordance with the well-known principle that a servant hired to a precise term is entitled to full wages, though he should by sickness or other accident be disabled from his service for a part of the time of his engagement. The pursuer here having voluntarily given up any claim for the time he was unwell, the Sheriff-Substitute cannot interfere with his non-insistance, and he has accordingly allowed the deductions given. The Sheriff-Substitute has only further to remark that the memorandum book produced (No. 8 of process) is no evidence for or against the contention of either party. It is quite possible, nay, even possible, that had the pursuer remained with the defender for the second half year of his engagement, an entry would have been made similar to that founded upon by the defender during the debate. Wages are payable half yearly, and the entry clearly refers to the sum the defender was to be paid for the half year. It is to be regretted that the amount in the entry on page 5 in reference to the pursuer should have been obliterated, as it would probably have thrown some light on the subject, though it could not have influenced in any way the decision now arrived at by the Sheriff-Substitute.

H. R."

Against this judgment the defender appealed; and the Sheriff has pronounced this interlocutor:—

"*Wick, 11th March 1878.*—The Sheriff having considered the defender's appeal and whole process, finds (in addition to the findings in the interlocutor submitted to review) that it is instructed that the value of a boll of meal is £1 sterling, and that the sum due and payable to the pursuer as the value of the 3½ bolls of meal to which he is entitled is £3, 10s., and not £3, 13s. 6d., as in the account sued for: Ordains the defender to make payment to the pursuer of the sum of £26, 1s. 3d. sterling, with £4, 1s. 7d. of expenses. To the extent of giving effect to this aforesaid finding and decerniture, sustains the said appeal, and recalls and alters the interlocutor submitted to renew. *Quoad ultra* dismisses said appeal, and adheres to the interlocutor submitted to renew, and affirms the same; and finds neither party liable in the expenses of this appeal.

GEO. H. THOMS.

"*Note.*—The presumption of law is in favour of the defender, Bell's Principles, section 174, Fraser on Master and Servant, 2nd edition, pp. 30, 31, and the evidence led by the defender does not rebut that presumption. This of course lends greater force to the Sheriff-Substitute's criticisms of the evidence, and removes the doubts he seems to have entertained. G. H. T."

Notes of English, American, and Colonial Cases.

INHABITED HOUSE DUTY.—*Exemption of tenement "occupied for purposes of trade only."*—Premises occupied for the purpose of carrying on the business of a telegraph company held (*dissentiente* Cleasby, B.) to be premises occupied for the purposes of trade within 32 & 33 Vict. c. 14. s. 11, and exempt from inhabited house duty.—*The Chartered Mercantile Bank of India v. Wilson*, 47 L. J. Rep. Ex. 153.—A building was occupied by a bank and a telegraph company in such a way that all the ground-floor and basement, except the telegraph company's entrance hall, and the basement under it, were the bank's, and the upper floors the telegraph company's, but there were doors between the telegraph company's entrance hall and the bank's lobby, which were open during banking hours to give a second access to the telegraph company's premises, and a care-taker lived on the third floor to protect the entire building:—*Held*, to be a dwelling-house within the Inhabited House Duty Acts.—*Ibid*.

COMPANY.—Promoter—Undisclosed contract—Fiduciary relationship—Solicitor for vendors and company—Liability of as promoter for costs—Compromise of suit—Commission.—The trustees of the will of James Bagnall desired to sell extensive ironworks of their testator to a company to be formed to purchase and work them, and entered into negotiations with Duignan for this purpose. Richard Bagnall, the tenant for life of the proceeds of sale, offered Duignan £1500 if he effected a sale. Duignan negotiated with Richardson, Richardson with Carlton, and Carlton with Grant. Eventually two agreements of March 6, 1873, were entered into, one called the secret, the other the ostensible agreement. By the secret agreement Carlton agreed with the trustees to form a company to purchase the ironworks, and, if he failed, to forfeit a deposit of £20,000, and the trustees agreed with Carlton, if the company succeeded, to return him the £20,000, and to pay him £85,000 out of the purchase-money. By the ostensible agreement the trustees agreed to sell the ironworks to a trustee for the company to be formed, at the price of £290,000. By a contemporaneous agreement between Carlton and Grant it had been agreed that Grant should find the £20,000 for the deposit, and should bring out the company, and should receive £85,000 out of the £85,000 for his remuneration. Grant prepared the prospectus, and Duignan saw it and approved of it; the only agreement referred to in the prospectus was the ostensible agreement. The company was brought out and succeeded, and the moneys payable under the agreements were paid. Duignan became solicitor to the company and received his £1500 from Richard Bagnall, but neither he nor any one disclosed the existence of the secret agreement to the directors of the company. In November 1874, some of the directors discovered the secret agreement; the matter was at once submitted to the shareholders, and by their direction a bill was filed to have a rescission of the contract and for repayment to the company of the £85,000 by Carlton, Grant, and Richardson, and of the £1500 by Duignan. Before the hearing, the part of the suit against the vendors asking for the rescission of the contract was compromised by a money payment. An offer was made by the bill to allow to Carlton, Grant, and Richardson a reasonable sum for expenses and commission.—*Held* (affirming the decision of BACON, V.C.), that Carlton, Grant, and Richardson were liable to refund the £85,000 to the company, but held (varying the decision) that they were entitled to deduct a sum for the expenses they had incurred, and, as an express offer had been made by the bill, a reasonable sum was awarded by the Court as commission. *Held* also (affirming the decision of BACON, V.C.), that Duignan was not liable to refund the £1500 which had been paid him by Richard Bagnall, but held (reversing that decision) that the suit ought to have been dismissed against Duignan at the time the compromise was made with the vendors, and that, while Duignan ought not to receive any costs up to that time, he was entitled to be paid costs by the plaintiffs from that time. *Per* CORRON, L.J.—When once persons who have got a contract for a company to be formed do put forward to the public an option to join in the company, and to take the purchase, then, from the very time when the contract is entered into, they make themselves trustees for the company, and are in the same position as if the company was existing at the time when the contract was entered into.—*Bagnall v. Carlton* (App.), 47 L. J. Rep. Ch. 30.

SAILING RULES.—One ship overtaking the other.—The A. and the P. C. were crossing ships. Both were on the port tack. The A. had the wind free, the P. C. was close hauled. The P. C. overtook the A. and came into collision with her.—*Held*, that the exception to the 12th rule applied, namely, that the vessel with the wind free must get out of the way, and that the 17th rule did not apply, namely, that the overtaking vessel must get out of the way. The A. alone to blame for the collision.—*The Peckforton Castle*, 47 L. J. Rep. P., D. & A. 12.

THE

JOURNAL OF JURISPRUDENCE.

FRASER ON HUSBAND AND WIFE.¹

WE have before us the two portly volumes which complete the "Treatise on the Law of Husband and Wife," the first volume of which we noticed some time ago. It is probably one of the most complete legal monographs that has ever been written, and will add in no small degree to the reputation for profound legal learning and research which the learned author at present enjoys, not only in Scotland but wherever jurisprudence is practised as a science. Some, no doubt, may differ from the conclusions which he draws, and the principles which in certain places he lays down, but none can deny the wonderful erudition displayed in every page of the work, and the clear and lucid manner in which the author gives expression to his views. The work of the Dean of Faculty has now been brought to a close, and one can understand, in thus seeing the book in its entirety, the amount of labour which it has required from its learned author. It embraces the whole range of the law, and treats every branch of it with the same copiousness as if each branch had been a separate treatise. The subjects of contracts, of succession heritable and movable, of international law, and trusts, are all dealt with in detail side by side with marriage, divorce, and cognate subjects. To criticise such a work as this is beyond our province, and moreover is altogether unnecessary with reference to a treatise so well known. For many years it has been out of print, and the additions to and alterations on the law have necessitated a reconstruction of the entire work. Its contents have been made accessible by elaborate indices and tables of contents, which in themselves are readable without referring to the work at all.

But although we do not mean to review a book which has passed beyond the domain of criticism, perhaps some instruction may be obtained by a few citations upon various topics upon

¹ Treatise on Husband and Wife according to the Law of Scotland. By Patrick Fraser, Advocate. Second Edition. 2 vols. 1876-78.

which the author has exercised his own independent judgment, and given expression to opinions which sometimes clash with judicial decisions. All this tends to wholesome thinking. Law is an elastic science, and the authoritative judgment of one year is often found to be an error in a few years thereafter. There is one novelty in the work deserving of all commendation, and that is a series of notices of the various authors, not usually cited by lawyers, upon whose authority reliance has been placed. We do not quote the following as the best examples of these notices, but at the same time they indicate somewhat the character of the books. The first is a notice of the famous treatise on Matrimonial Law by Sanchez, a Spanish lawyer, whose work must have been often noticed as being a great authority, in the reports of judgments on matrimonial causes:—

“*Sanchez* was a Spanish Jesuit, born at Cordova in 1551, and died in 1610. His treatise is the most extraordinary book ever written by a man professing to write about jurisprudence. Its merits consist in this, that it is at once the most learned, the most accurate, and the most practical work published by a canonist upon the subject of marriage, and all the duties and rights and liabilities that flow from that institution. It is an authority often cited by Lord Stowell, and sometimes by Dr. Lushington, as laying down correct rules on such subjects. Even Bayle praises the work for the great erudition displayed in it. But, on the other hand, there can be no doubt that it is one of the most obscene books ever printed, so that even Bayle himself is compelled to say, that ‘the temerity he had of explaining an incredible number of filthy and horrible questions may produce great disorders.’ In a note to his *Life of Sanchez*, he quotes authorities who say that all his impure knowledge arose from his experience in the confessional; ‘that he was a man of an admirable virtue and perfect chastity; his immaculate virginity accompanied him to his tomb, and the day he was buried all people thronged in, either to kiss or to touch with their heads his body covered with flowers and shining with virginal chastity.’ Voltaire, in his ‘*Dictionnaire Philosophique*,’ v. *Impuissance*, has stated some of the prurient questions which Sanchez discussed, and which excited the ire of Bayle. The work has been several times reprinted, and the above edition is not the latest.”

The next author noticed is an American called J. P. Bishop, who has written a treatise on the Law of Marriage and Divorce, which has gone through five editions:—

“*Mr. Bishop* is the most entertaining of all writers on law; and he is also the wisest, if wisdom be measured by the decision with which he sets all mankind right. The writers on the same subject, who have gone before him, are frequently admonished and rebuked. Whether they discourse of the laws of their own country, or of the civil or of the canon laws, they are equally deserving of correction; and they receive it. The leviathan combats with equal confidence, in foreign and in his own native American waters. The judgments of courts of law are equally unsatisfactory. Either they were wrong, and are to be utterly ignored; or if, by haphazard, the conclusion arrived at is right, it was attained by the wrong road. *Vixere fortes ante Agamemnona multi*, is, according to this author, a delusion. *He* is the only one who has, up to this time, trod with a firm step the path of glory. All this is lively writing; but it is given at inordinate length. The author should have remembered that brevity is in writing what charity is to all the other virtues; and further, that a man

must speak sense before he is considered an authority. As to how Mr. Bishop speaks, we have it as follows from the third edition :—

“Six years ago appeared the first edition of the present work. In it I came before the public for the first time as an author. Nearly four years of hard brain labour had I expended upon it. Every volume of the reports I had taken into my hands, had examined its contents to see whether I could find in it matter pertaining to my subject ; the digests I had consulted likewise ; all the books of every other sort available to me, and containing what I thought to be useful for my purpose, I had read. The cases I had not merely examined cursorily ; I had read every word of every case, however long, including the statement of the case and the arguments of counsel when given ; I had pondered over every case, not merely while the book was before me, but while I was passing to and fro between my office and my house, while I was reclined upon my bed at night, while also most other persons would have been engaged in recreation or pleasure. I had considered for myself not only every argument which I had seen in any book, but every one which imagination could bring to me. I found the law to be a jumble of the light and the dark, in jurisprudence ; I found the judges of our own country not to have examined this subject as they had done other subjects. I found chaos and confusion, where, if I would succeed in my undertaking, order must arise from beneath my hand.”

Mr. Bishop, it will be observed, has no mean estimate of his own abilities, and has come into collision pretty frequently with Mr. Fraser. Still at the same time he is not unkindly dealt with throughout this treatise on Husband and Wife.

Story's treatise on the Conflict of Laws is spoken of in the following just terms of commendation :—

“Story's treatise on the Conflict of Laws was published in the year 1834, and proved of great service to the profession in all countries. Prior to his book there had been nothing written on the subject of Private International Law since Pothier's days. The knowledge on the subject was scattered through treatises of French and Dutch writers, which had become very scarce. Story extracted from the works of these writers a systematic treatise, which deserves still to hold a high place, notwithstanding all the researches of later writers and the learning of later publications. It was said by Lord Westbury that Story's work was not deserving of the name of an authority, because opposite opinions might be extracted on any point within a couple of pages. But this remark is unjust, and receives only apparent countenance from the fact that Story cites from his authorities, with conscientious honesty, opposite opinions. He never misquotes, nor breaks off a citation in order to keep back from his reader an opinion that may be contrary to his own ; nor does he ever withhold his own opinion, which is usually characterized by sound sense and judgment. Since his time many of the points that he stated as being within the range merely of speculative discussion, have been made the subject of decisions by Courts of law, and in almost every case his conclusions have been sustained. No doubt in some of them, such as the distinction between two kinds of incest, the English and Scottish Courts have refused to follow him, although the Courts of his own country have supported his views to the full, and this after a review of all the English and Scotch decisions. Take the work as a whole, it is one of the safest guides in administering private international law, as it also is the most easily consulted.”

In the first volume of the treatise on Husband and Wife there are two very elaborate chapters, one on the constitution of marriage by *promise cum copula*, and the other on the doctrine of the alleged

"*communio bonorum*" between husband and wife. These chapters are in the character of destructive assaults upon old traditions, which have been handed down, from a not very remote period, in the text-books of several legal writers, and repeated without much consideration from the Bench. According to Mr. Fraser, *promise cum copula* does not make marriage. It constitutes merely a pre-contract, which may, during the lifetime of both parties, be converted into marriage, but which, without such conversion, would not make the man or the woman husband and wife. The chapter on the subject has been elaborated with great care, and the whole law traced to its origin, first from the Papal Rescript of Gregory IX. down through the decisions and practice of the Courts to the present time. The way in which this pre-contract came to be regarded as equal to marriage, is exhibited both in the practice of the English and Scottish Courts, and altogether presents a very interesting chapter in the history of error.

With regard to the *communio bonorum*, the exposition leads to the conclusion that the term was only introduced into Scottish nomenclature about the time of Lord Stair, and that it really represents no actual veritable communion of goods between husband and wife, but is simply a mere *name* having no practical effect. The husband is proprietor of all the personal estate of his wife as much as he is of his own, and can deal with it without any control by her, as if he had made it by the exercise of his own industry. It is thus well to get rid of a useless term, which has often resulted in misleading Courts of law, and which it was very difficult to understand, in the presence of the undoubted fact, that the husband was absolute *dominus bonorum*, and not merely a partner in a communion of goods.

Whether the attack which the author makes on the action of *damages for breach of promise of marriage* can be defended to the extent to which it is here carried, may be open to question. The fact that there is now a Bill in the House of Commons for abolishing the action entirely in England, brought in by Mr. Herschel, Q. C., indicates that there is a growing opinion in England, against the expediency of continuing such a protection, or such a means of vengeance, to deserted females. Here is what is partly said upon the subject by Mr. Fraser:—

"Of late years, it would seem as if jurors had determined to stamp out the wrong of breach of promise, by the mere vehemence of their verdicts. The cases secure always a crowded audience; and popular applause or indignation are evoked as in a theatre. Not one of these cases is fitted for jury trial, and every one is sent for that mode of decision. This mode of procedure (instead of a trial before a judge without a jury) is cruel to the parties themselves, and to avoid it many a defender submits to any extortion that may be insisted on. The kind of cases which occur, indicate how well this breach of contract could be disposed of, without the noisy accompaniments of a jury trial. A more incompetent tribunal for disposing of such cases could not, without considerable thought, have been devised. The ordinary class of cases are something of this nature. A young man is enticed into engaging himself to marry

a woman much his senior, who knows the value of written evidence. He soon discovers that he has made a mistake, and would fain, in his helpless condition, be released by the mature woman. On the contrary, she goes into Court, and her lawyers provoke a good deal of laughter by the reading of letters; a sentimental appeal to the jury follows, and eventually there is gained for the injured female a sum equivalent to three years' salary of the man. In almost all cases the damages are excessive; and the excess seems to point to certain personal considerations affecting the jury. Perhaps they are themselves fathers possessed of daughters whose affections may be trifled with. If one were to believe that only the deep injury done to a woman's feelings could drive her into making her wrongs public, the damages would often be too small. But the women who are exceptionally sensitive, and who would suffer most from a disappointment in love, would be the least likely to carry their sufferings into Court, and beg for reparation from a jury. In the worst cases of this sort—and that grievous injury is frequently inflicted by the thoughtless vacillation of men on sensitive-natured women there can be no doubt at all—no complaint is ever made in the shape of an appeal to a jury. It is the business-like young woman, who knows what the maudlin admissions of a young man are worth when they are put down in writing, who manages to make capital of her wrongs. It is nothing to her that she ought to congratulate herself on her escape from marrying a light-headed, fickle, and foolish person, whose wavering sentiment and inconstant purpose would have been a hundred times more dangerous after marriage. Perhaps, indeed, she is already looking forward to her chances of another match, which are largely affected in certain circles, by a verdict which practically gives her a handsome dowry."

The chapter upon *jurisdiction in questions of international law* is one that brings the whole of the authorities down to the latest date. It is a curious story in itself, to read the decisions of English Courts upon this matter. The old doctrine of the case of *Lolley* has now been abandoned, and divorces, granted by foreign Courts, are no longer to be set aside in England as *ultra vires*. The struggle upon this point has ended in the defeat of the English tribunals; while, on the other hand, the Scottish Courts have receded from positions which they had taken up, and which had been found untenable. Residence for forty days in Scotland is no longer a ground of jurisdiction upon which a divorce may be granted; nor is the fact that adultery was committed in Scotland, and the defender was personally cited there. The whole of this branch of the law has been cleared from an immense mass of superincumbent rubbish, by the discussions of later years, and the present condition of the law will be found very clearly expounded in the present work.

Before we come to the Supplement, we have a very elaborate and practical exposition of the subject of marriage contracts, embracing the law of fee and liferent, and of trusts. This is a subject that affords little room for criticism. It is a discussion of dry and positive law, though there is certainly one part of it from which we are tempted to make an except. This relates to the doctrine recognised in the cases of *Anderson v. Buchanan*; *Pringle v. Anderson*, 6 Macp. 982; *Hope v. Hope*, 8 Macp. 699; *Menzies v. Murray*, 2 Rettie 507, to the effect that a trust-conveyance by a woman in her antenuptial marriage contract, of property which belonged to her before marriage, could not be revoked by her, under

any circumstances whatever, *during her husband's lifetime*, and this although all the children of the marriage had attained majority and consented to the revocation, and although the trustees were also willing that it should be put an end to. Referring to the case of *Menzies v. Murray*, the Dean of Faculty makes this comment upon these cases:—

“This was the unanimous decision of seven judges, and, were it not for the fact that a number of judges, of equal eminence, had come to a different conclusion, this decision might be held to settle the point. Such diversity of judicial opinion justifies a consideration of the grounds of expediency—for they are only that—on which the decision rests. It will be observed that, in the case of *Menzies*, every person who had the slightest interest in the matter, concurred in desiring that the trust should be put an end to. This desire, however, was refused by the Court, simply because it might so happen that the husband, with whom the wife had lived for thirty years, might so act, that her contingent liferent might be defeated, in consequence of his manipulating the money. The Court did not inquire into the character of the man, and as to whether he would mispend the fund if he obtained the chance, by operating on his wife's affections or her fears. The presumption of fact and of marital experience was held to be against him. If there had been no husband, it has been already seen that the wife, though a woman, could put an end to the trust, and take the funds into her own hands. The restraint, or the prohibition, or the protection (whatever it is), is imposed or given to, not sex, but coverture. With all submission, this judicial legislation will be productive of greater harm than good. It will prevent the carrying out of arrangements highly expedient, proper, and humane; and rendered necessary in consequence of the change in circumstances, from what they were when the marriage contract was entered into. It is out of all reason, to regard the husband as the natural enemy of his wife. The very cases in regard to which the Court pronounced these judgments, were cases where the spouses had lived together and partaken of the same fortunes for many years of wedded life. It is hard and oppressive to prevent a wife from rearranging her estate, in such a manner as to benefit the partner with whom she had borne for a lifetime the yoke of toil and the burden of care. It may be that, in certain cases, the results which have been suggested, of the loss to the wife, of the liferent that had been provided for her, may be the consequence of the exercise of such power on her part. But the liability to abuse does not render what is just unjust. These results, too, are not to be anticipated in the ordinary cases, and are counterbalanced by the advantages that would follow in the common course of married life, from treating a wife as a rational being, capable of holding her own, while at the same time enabling her to promote the comfort of her husband. It seems to be forgotten in all these discussions, that the law of Scotland puts in the hands of a wife, a power which the law of England does not give her, viz. that of revoking any gift which she might make of her estate, upon the ground of donation; and this power she could exercise, either during her husband's life or after his death. The law, too, is very helpless and very inconsistent, if this legislation is to be adhered to; because it has been determined, that a wife may deal with any provision made for her by marriage contract as she pleases, provided the property over which it is secured has not got into the hands of trustees. For example, the liferent secured by infestment, provided for her by the marriage contract, may be renounced or assigned away, or given up to the husband at her pleasure (*Standard Property Co. v. Cowe*, 4 Rettie 695, 1877). All the reasoning on which the above cases rest is applicable to this case. The wife is open to the same importunities, or to the same terrified subjection, when there is no trust, as when there is one. But all this notion of importunity and marital domination is a mere exaggeration of the exceptional into the general case. Persons who have had to advise

married women as to their powers under these deeds, have certainly often witnessed much distress on the part of the women; but the distress arose only when they were told that they were utterly helpless, and that they could not touch a farthing of their capital for any purpose, however just. Why is the wife allowed to exercise dominion in the one case, when there is no trust, and not in the other? The practical result in the present state of the law, is that conveyancers ought to insert a clause in every marriage contract, to the effect that the wife may recall the trust, if she attain a certain age without having children; and that the property shall be held by her as her separate estate, from which the *jus mariti* is excluded."

We have not left room to refer to the "Supplement," which contains a great deal of very curious and interesting matter. There is first a commentary on "The Married Women's Property Act, 1877," which is shown to be a very extraordinary piece of legislation, that will no doubt be fruitful of good results—in many litigations. But the most startling part of this Supplement, is a chapter devoted to prosecutions for incest, and particularly with reference to marriage with a deceased wife's sister. It is the fact, that incest is not a crime by the law of England, and hence criminals found guilty of incest in Scotland, and sentenced to long periods of penal servitude, are no sooner sent up to England, than they are immediately liberated. For example, Lords Ivory and Deas sentenced a man at the Inverness circuit, to fourteen years' transportation, for having had connection with his wife's sister; and within four weeks after he was sentenced, the Home Secretary liberated him. And so on with other cases of incest here noted. Either the Act 1567, cap. 14, says the author, "should be allowed to pass into desuetude or be repealed; for it is in vain to expect, that harmony will be established between the laws of England and Scotland by the Legislature enacting that the rules of 1567, cap. 14, shall be the law of England. The compromise between the law and the facts of experience is not a very intelligible one, when it consists in dropping down from a sentence of fourteen years' transportation, or eight years' penal servitude, to eight months' imprisonment."

In taking leave of this work, we have only to add that the forms of summonses contained in the Appendix in reference to Consistorial Actions supply a want which has been long felt.

THE CHANTRELLE CASE.

SINCE the trial of Dr. Pritchard for the murder of his wife in 1865, no more important murder case has occupied the attention of the High Court of Justiciary than the melancholy investigation which commenced on the 7th of last month. Although failing to arouse the public interest so fully as did the crime committed by Dr. Pritchard, and lacking those elements akin to romance which characterized the case of Madeline Smith, the circumstances attending the Chantrelle case were intricate and peculiar.

Seldom, if ever, did a guilty man take his stand in the dock on a charge of murder with less to favour his chance of escape than M. Chantrelle. It is true that for six months before his trial the people of England had firmly believed in the guilt of William Palmer, and that the proceedings had actually been taken under a special Act of Parliament to the Central Criminal Court, as the only method of securing a fair trial for the accused. There have been other cases in which the public have taken a strong bias against prisoners from which it was almost impossible to suppose that the jurymen could be entirely free. We do not suppose that it was so in the case of M. Chantrelle. We have little doubt that the details of his family life were unknown, save to a few persons. The newspaper notices of the death of Madame Chantrelle, and the accounts of preparation for her husband's trial which from time to time appeared, contained no references to the private relations of the husband and wife. Yet disclosures were to be made in Court which were certain to raise against the prisoner at the bar feelings of indignation and disgust. The seducer of his pupil, a girl of sixteen years of age, who reluctantly married her, and treated her during their married life with curses, neglect, blows, and actual threats of death, has forfeited all claim to pity, and can scarcely hope to receive the benefit of a doubt, when the public prosecutor arraigns him on a charge of having murdered her. The jury are but men, and must inevitably yield to the influence of facts like these.

" All several sins, all used in each degree,
Throng to the bar, crying all, Guilty ! guilty ! "

This being so, it is satisfactory to reflect that no point was unduly pressed by the Lord Advocate against the pannel, that he was defended by one of the ablest and most ingenious counsel at the bar, and that the presiding judge delivered a charge which displayed no bias whatever, and which stated in the clearest possible manner the points to which the jury should direct their attention.

The case was one of purely circumstantial evidence. Chantrelle was in needy circumstances. He disliked his wife, whom he was in the habit of abusing and threatening. He effected a policy of insurance on her life with an Accident Insurance Company. One morning the unfortunate woman was found in an unconscious state, which Chantrelle stated to the doctor who was sent for to be the result of an escape of gas in her room. In a few hours she died. The theory of the Crown was that Chantrelle had made up his mind that it was possible to poison his wife in such a way as to escape detection, by means of opium; and that while she was lying in the unconsciousness which precedes death from opium-poisoning, he intended to create an escape of gas in the room, so as to account for her death, and entitle him to the money for which he had insured her life. A witness at the trial narrated how, on one occa-

sion, Chantrelle had actually, according to his wife's statement, said he could poison her so that all the Medical Faculty of Edinburgh could not prove it. He very nearly succeeded. On the 31st of December 1877 Madame Chantrelle felt ill, and went to bed early. Her servant, Mary Byrne, who went to see her in bed about half-past nine o'clock at night, found her in good spirits and feeling better. Madame Chantrelle requested her to rise earlier than usual and prepare some tea, which was to be brought to her at an early hour. At that time her youngest child, a baby, was in bed with her. M. Chantrelle occupied another room. The servant peeled an orange and divided it into four parts; one of the parts she gave to Madame Chantrelle, and left the other three lying on a plate, along with some grapes, by the bedside. She then left the room. Next morning Byrne was up early, and while working in the lower flat of the house she heard a sound of moaning, which led her to enter Madame Chantrelle's room. Madame Chantrelle was now in a very different state from that in which she had been left the night before. The scene is best described in the witness's own words:—

"The bed-clothes were drawn down over the body about half way. The mistress was lying next the door, and partly on her side and back as on the previous night, but nearer the edge of the bed. The pillow was drawn a little from underneath her head. The baby was away. Madame now and again moaned very heavily after I went into the room. She was awfully pale-looking; her eyelids were closed over the eyes. I noticed a green brown-like stuff on the edge of the pillow and bed—like vomit. I took and shook the mistress by the shoulder, and said, 'What's wrong with you? can you not speak?' I took her a second time by the wrist and shook her, but she made no answer, and only moaned."

Much alarmed, Byrne went and roused her master, whom she found in bed with his three children, one of them being the baby, who had been left in Madame Chantrelle's bed on the previous evening. Chantrelle entered his wife's room, and, sitting down on the bed, spoke to her. She made no answer. It must here be noticed that up to this time not one word had been said about any escape of gas, nor had any smell of gas been perceived by Byrne. Suddenly Chantrelle said, "I hear the child crying," and sent Byrne out of the room. She went and found the child fast asleep. When she returned she found Chantrelle coming from the window, as if he had been raising the sash. He spoke to his wife again, and then asked Byrne if she did not observe a smell of gas. She answered that she did observe a slight smell.

Ultimately medical attendance was procured, and the general import of the evidence was to the effect that Chantrelle represented gas-poisoning as the cause of his wife's illness. In the course of the morning the patient was taken to the Infirmary, where she died during the afternoon. But previous to her death Professor MacLagan had seen her, and, although called to attend the case as one of gas-poisoning, had almost immediately stated his opinion that the case

was one of poisoning by some narcotic, *probably opium*. This was Dr. MacLagan's diagnosis of the case. He failed to detect signs of gas-poisoning, but believed the patient's symptoms to be those of opium-poisoning.

In these circumstances a *post-mortem* examination was made of Madame Chantrelle's body, which yielded negative results. There was no natural cause of death, nor were any traces of poison found. On the sheet and bolster-slip of Madame Chantrelle's bed, and on her night-dress, there were four stains, which were chemically tested.

"On the sheet there was, within four inches of one of its edges, an irregularly square-shaped stain, twelve inches each way, with grape seeds and fragments of orange adhering to it. Close to this stain, at the margin farthest from the edge of the sheet, there was a brown mark, about three inches long and one and a half broad, consisting of irregular but well-defined patches of a dark-brown matter, stiffening the cloth, which had been applied to the same side of the sheet as that to which the fragments of orange and grape adhered. A small portion of this dark-brown stain was cut out and macerated in distilled water. The brown solution thus obtained had, when gently warmed, a feeble but distinct smell of opium, and it had a bitter taste. It gave freely with perchloride of iron the reaction of meconic acid, and with iodic and sulphomolybdic acids the reactions of morphia. The stain was evidently due to opium. A small portion of the feebly-stained cloth at a distance from the deep-brown stain was cut out and tested for meconic acid, but we could not detect it. . . .

"The bolster-slip showed a defined but feebly-tinged stain, fifteen inches long by ten broad, having fragments of orange adhering to it. This stain was cut out and macerated in distilled water. It yielded a clear fluid with a very pale yellow tint, feeble sweet taste, and very feeble acid reaction. It had not the least trace of bitterness or acrimony, this last quality indicating that it did not contain morphia or any of the vegetable poisons. We subjected it to the process for chloral, but we got no indications of the presence of that substance. . . .

"On the upper and back part of the left shoulder of the bedgown there were diffuse stains with fragments of orange adhering, but no grape seeds were noticed. Near these, at the part corresponding to the left shoulder-blade, there was a defined stain one and a quarter inch square, where the cloth was stiffened by a dark-brown somewhat glistening substance, which had obviously been applied to the outside of the cloth in a soft solid state. In the middle of this stain was a small globular mass of a dark-brown colour, which, when picked off, was found to weigh three-tenths of a grain. Around the defined stain the cloth was marked by a brown ring apparently resulting from this brown matter having been in contact with fluid. A portion of this stain, about quarter of an inch square, was cut out and macerated in water. It gave a solution having the odour and taste of opium, and which gave strongly the reaction characteristic of meconic acid. The small globular mass picked off from the stain was treated in a similar manner. It gave a brown fluid, having the taste and odour of opium, and which gave not only the reaction of meconic acid, but the reactions of morphia with iodic and sulphomolybdic acids. A trifling amount of insoluble matter remaining after treating the small globular mass with water was found, microscopically, to contain some very minute fragments of vegetable tissue and some crystalline particles. It contained no calomel nor lead. It therefore did not appear to have been opium taken in the form of calomel and opium or lead and opium pill. Its whole physical and chemical characters seemed to us to show that it was opium, most probably in the form of extract." (*Reports by Drs. MacLagan and Littlejohn.*)

It is unnecessary to recapitulate the medical evidence; but there can be no doubt (it was in point of fact admitted at last by the accused himself) that the presence of opium in the brown stains was clearly established. There was, however, no evidence that the opium stains had been caused by vomiting; while, on the other hand, though the fact was not scientifically proved, there was no reasonable doubt that the other stains had been so caused. The result is that the stains, which were almost certainly vomit stains, did not contain poison; but we do not know whether the stains which did contain poison were vomit stains or not. This is to a certain extent unsatisfactory; and M. Chantrelle, seizing on this point, stated (after sentence had been pronounced) that he believed some one had rubbed the opium on the sheet and bedgown. This suggestion cannot, however, be entertained when we consider that the opium stain on the bedgown corresponded so exactly with the opium stain on the sheet as to leave little doubt that it was caused by Madame Chantrelle having lain down in such an attitude that her left shoulder rested on the stain on the sheet. That any one intending to criminate M. Chantrelle by putting opium on Madame Chantrelle's night-dress should have rubbed it exactly on that part would have been a strange coincidence.

It was proved that M. Chantrelle was in possession of opium in the precise form in which it was found on his wife's bed. There was no serious contention that suicide was probable. No valid grounds were suggested for supposing that the deceased had taken poison by accident. The pannel alone was proved to have had the means, the skill, and the opportunity to administer the fatal dose. Yet we very much doubt whether he would have been found guilty had it not been for his previous conduct to his wife, and his anxiety to make out that the case was one of gas-poisoning. If one thing was more clearly proved than another it was that Madame Chantrelle had not died of gas-poisoning. There had been no escape of gas till after she was found by Mary Byrne in a dying condition. There was no need of scientific evidence to show that if a sufficient escape of gas to prove fatal had taken place the smell of gas would have pervaded the whole house, or, at all events, would have been very strong in the deceased's room when Byrne entered it. When the room was examined by gasfitters a pipe was found broken off behind one of the window-shutters. M. Chantrelle stated that he had never known of its existence. It was proved that he had. It was also proved that it must have been broken off on purpose. This at once suggested a reason why, when the servant had been sent out of the room on the pretext that the baby was crying, she found M. Chantrelle on her return coming back from the window. These circumstances are so suspicious as to be almost entirely inconsistent with the pannel's innocence. The case as a whole was one in which the prosecutor was able to show previous malice, obvious motive, possession of the means of death, and opportunity.

There can, we think, be no doubt that the verdict which the jury felt it their painful duty to return was called for by the law and justice of the case.

INTERNATIONAL JURISDICTION.

II. IRELAND.

IN Ireland the history of service on parties out of the jurisdiction closely resembles what we have described in England. The power of the Common Law Courts to order such service depended on sec. 34 of the Irish Common Law Procedure Act, 1853, 16 & 17 Vict. c. 113, which provides that where the Court is satisfied that the defendant in any summons or plaint of which the cause of action has arisen within the jurisdiction has not been served, and has not appeared, and that due and proper means were used to serve the writ; or that the defendant is out of the jurisdiction, and can be properly served through or upon any agent or representative, or any manager of his real or personal estate within such jurisdiction; or that the defendant has removed to avoid service, or on any other good and sufficient cause;—then the Court may authorize substitution of service through the Post-Office, and on default of appearance the plaintiff may proceed. This section has frequently become the subject of judicial interpretation. In *Watson v. Atlantic Royal Mail Steam Navigation Co.* (whose registered office was in Cannon Street, London), L. R. 10 Ir. C. (N. S.) 163, where the defendants contracted at New York to carry the plaintiff's luggage from there to Galway in Ireland, and the ship was wrecked and the luggage lost on the high seas, it was held by Baron Greene that although it was not necessary that every fact constituting the cause of action should have occurred within the jurisdiction, yet in this case the mere failure to deliver in Galway was not a sufficiently material fact or necessary ingredient occurring there so as to justify an order under sec. 34. This case, however, was doubted in *Aston v. London and North-Western Railway Co.* (L. R. 1, Ir. C. L. 604), where the defendants had contracted to carry the plaintiff's wife with reasonable care from Dublin *via* Holyhead, but an accident occurring near Holyhead, the lady was injured and the contract broken. The Railway Company had an agent in Ireland. It was argued that there was a *consummate* cause of action in England, where every fact entitling to sue, or requiring to be proved, occurred, but the Court sustained the jurisdiction. In *Kelly v. Dixon* (L. R. 6, Ir. C. L. 25) timber in Ireland was sold by letters passing between the seller in Ireland and the purchaser in England. The purchaser afterwards inspected the timber, and signed an agreement in Ireland for the purchase of timber of a specified quality to be delivered in England against bills, delivery being secured by deposit with the buyer of the lease of seller's

premises in Ireland. After delivery of a quantity of timber the defendants intimated that they would take no more, the quality being defective. In this case the contradictory decisions on the English Common Law Procedure Act were quoted to the Court. C.-J. Whiteside, on a review of many cases, came to the conclusion (1) that it was sufficient if part, or even the smaller part, of the cause of action arose in Ireland; and (2) that it was not necessary that the defendant should have any agent in Ireland, but that the Court would order service through the Post-Office if it seemed to the Court that the defendant would be duly served. In *Walsh v. Great Western Railway Co.* (L. R. 6, Ir. C. L. 532) a widow sued for damages in respect of the death of her husband, who was employed on board a steamer of the defendants plying between Milford and Waterford. The boiler had exploded at a point more than three miles from the Irish coast, and the steamer had to put back to Milford. It was said that the explosion was caused by a corrosion of the superheater, which must have been going on for three months prior to the accident, during which period the steamer was frequently in Ireland. Baron Deasy held that the negligence consisted in despatching the steamer from Milford while the boiler was in an improper state; and he therefore refused to order service. In *Matthews v. Alexander* (L. R. 7, C. L. Ir. 575) the defendant was a London tea-dealer, who, by contract written in London, hired the plaintiff as commercial traveller. The plaintiff was afterwards dismissed by letter, posted in London, and received in Dublin, on which he brought his action in the Irish Court for wrongous dismissal. The Court of Queen's Bench, influenced by the English decision already noted of *Cherry v. Thompson*, found that the receipt of the letter in Dublin was merely evidence of the breach, not the breach itself, and that there was therefore no jurisdiction. Mr. Justice Fitzgerald, however, one of the ablest of the Irish judges, took occasion to express his dissent from *Kelly v. Dixon*, and his doubt whether "the Court has authority to serve out of our jurisdiction a party who has never been domiciled and never resided in this country, and has no property here, nor any agent of any kind to represent him, and has not removed from this country to avoid service." The learned Judge observed that the English Common Law Procedure Act, sec. 18, excepted from its operation defendants residing in England and Scotland presumably on the ground that such defendants could be as conveniently sued in the Superior Courts of the country in which they resided. Again, in *Macken v. Ellis* (L. R. 8, Ir. C. L. 151) the defendant executed in London a charter-party that his ship should ship at Santander 300 tons of flour and deliver to the plaintiffs in Dublin, which charter-party was transmitted to Dublin and there signed by plaintiffs. But the ship could hold only 200 tons, and delivery was therefore made only of that quantity. The same Court held that the breach in not loading 300 tons in Santander and delivering them in Ireland was a cause of action arising

in Ireland; and, further, that separate causes of action arose there (1) for falsely warranting the capacity of the ship; (2) for fraudulently misrepresenting her capacity; (3) for negligence in not procuring a large enough ship. C.-J. Whiteside in his opinion makes the extraordinary quotation from Lord Ellenborough (which must have referred to entirely different matters—such indifferent matters as are properly left to the absolute discretion of the Court) that “it is not of much consequence what the practice of the Court may be, provided it be generally known and steadily adhered to.” He added, “It would be a mischievous decision to say that a merchant in Dublin should not be allowed to recover against a party who has not here fulfilled his contract.” Justice Fitzgerald observed that it was not sufficient—it would indeed be contrary to the statute to hold as sufficient—that *any* part of the cause of action arose in the jurisdiction. He adopted the English rule that “cause of action” means “the act or omission constituting the violation of duty complained of, and not any part of the whole cause of action.” The opposite side of the principle may be illustrated by the case of *Deane v. Sandford* (L. R. 9, Ir. C. L. 228), where the plaintiff, resident in Ireland, sent to the defendant, resident in England, a proposal for engagement as agent on commission in Ireland, which was accepted by letter, and the plaintiff was afterwards dismissed from the agency by a letter posted at London. In an action for wrongous dismissal it was argued that the acceptance of the engagement in Ireland gave a cause of action there. It was not disputed that on the authority of *Cherry v. Thompson* the breach occurred in England. The Court refused to order service, the contract being made in England; but C.-J. Whiteside said: “It would be a most unfortunate decision if it were laid down as an abstract proposition that when a merchant in England writes to a person in Dublin and offers to appoint him his agent, and the party so written to accepts the engagement, and acts upon it in this country, and afterwards brings an action for wrongous dismissal, he must go to England to institute the proceedings. I lay down no such proposition, because I hold that the performance of work in Ireland is an essential part of such a contract.” Justice O’Brien observed that if the action had been work done in Ireland there would have been jurisdiction; and Justice Fitzgerald repeated his protest that where the defendant did not reside in Ireland, and had no agent or representative there, the Court in ordering service was usurping a jurisdiction not conferred by the statute. He had again occasion to protest in *Willis v. London and North-Western Railway Co.* (L. R. 10, Ir. C. L. 95), where the defendants had contracted to convey the plaintiff and his wife and his luggage from Derby to Greenore in Ireland, and during the trans-channel part of the journey, just outside Holyhead Harbour, the wife was injured and the luggage lost. The defendants had a branch office at Newry in Ireland. The Court, following the case of *Aston*

above noted, held that the failure to convey to a point in Ireland, just as in the other cases the failure to deliver goods there, constituted a breach, and therefore a cause of action within the jurisdiction. Justice O'Brien said: "It cannot be contended that we should lay down a general rule to refuse the substitution of service in any case against an English railway company or steam packet company where their failure to perform their contract for the conveyance of passengers or goods to some place in Ireland was caused by circumstances which occurred in England (or elsewhere out of our jurisdiction). Those companies find it to their advantage to enter into contracts, and also to enter in England into contracts which are to be performed in Ireland. They have agents here to protect their interests; and we should not refuse the substitution of service on the ground that it might be more inconvenient to them to bring their servants over to attend the trial here than it would be to the plaintiff to go to England for that purpose." Justice Fitzgerald, in dissenting from the judgment, pointed out that the contract, the breach, and every fact requiring to be proved on either side, occurred outside the jurisdiction. Precisely the same divergence of opinion is seen in a Scotch case (*Brunton v. Robertson*, L. R. 10, Ir. C. L. 494), where the plaintiff in Ireland consigned cattle to the defendants in Glasgow, to be sold by them as *del credere* agents for the plaintiff's benefit. The plaintiff delivered the cattle to the Dublin and Glasgow Steam Packet Co., the carriers selected by the defendants, who paid the freight, sold the cattle, but did not account for the whole price. The Court held that the delivery of the cattle to the carriers in Ireland was a completion of the contract, and that there was therefore jurisdiction. C.-J. Whiteside said: "I see no reason why a stranger—if he choose to purchase at Stonefield or Stoneybatter, and to order, I won't say how many head of cattle, and have them sent across to him to Scotland, payable on delivery—should not be made to pay for them in this country when he neglects to do so." The only other Irish case we desire to mention is the important one of *Kett v. Robertson*, Ir. C. L. (N. S.) 186, where the Court held that the delivery by an insurance agent in Ireland of a policy signed and sealed in England constituted the completion of the contract, which was therefore a cause of action arising in the jurisdiction; and that service was properly directed to be made on the resident agent. We reserve our observations on the principle of *Kett v. Robinson* until we have stated the Scotch and English law upon the subject of the domicile of agency or branch office. As regards the practice of the Courts of Equity in Ireland, we have not been able to find any authoritative statement, but it may be presumed to have followed the English chancery practice.

Whatever may have been the inferences properly drawn from these authorities in the law of Ireland, it is scarcely necessary now to discuss them, because the whole matter is now regulated by

Order X. of the Rules of Court, made upon 18th December 1877, for carrying into effect the Supreme Court of Judicature Act, 1877, 40 & 41 Vict. c. 57, as amended by the additional Order of 8th April 1878. We shall print these Orders in full, because the published copies of them, like other valuable works published by Mr. Falconer, law bookseller, Dublin, do not seem to reach the Advocates' Library:—

"1. Service out of the jurisdiction of a writ of summons, or notice of a writ of summons, whether on a defendant to the action or a third party ordered to be served, may be allowed by the Court or a Judge whenever the whole or any part of the subject-matter of the action is land or stock, or other property situate within the jurisdiction, or any act, deed, will, or thing affecting such land, stock, or property. *And* whenever the contract which is sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in any such action, or for the breach whereof damages or other relief are, or is demanded in such action, was made or entered into within the jurisdiction; *and* whenever there has been a breach within the jurisdiction of any contract wherever made; *and* whenever any act or thing sought to be restrained or removed, or for which damages are sought to be recovered, was, or is to be done, or is situate within the jurisdiction.

"2. Every application for an order for leave to serve such writ or notice on a defendant out of the jurisdiction shall be supported by evidence, by affidavit, or otherwise, showing in what place or country such defendant is or probably may be found, and whether such defendant is a British subject or not, and the grounds upon which the application is made.

"3. Any order giving leave to effect such service or give such notice shall limit a time after such service or notice within which such defendant is to enter an appearance, such time to depend on the place or country where or within which the writ is to be served or the notice given; and such leave may be given by the same order by which leave is given to issue the writ of summons for service out of the jurisdiction, or of which notice is to be given out of the jurisdiction."

It will be seen that, except in two points, this Rule is identical with that under Order XI. of the English High Court of Justice, which we have previously examined (*supra*, p. 179). The Irish rules, it would rather appear, do not apply to persons who are not British subjects; and they are not qualified by any direction to the judge exercising his discretion, such as the Irish lawyers very properly insisted upon adding to the English rule of 1875 (*supra*, p. 185). When the Irish Courts, therefore, are asked to order service on a person in England or Scotland, it is not necessary, at least so far as these rules are concerned, to pay any regard to the amount or value of the property in dispute, or to the existence in the pro-

posed defendant's country of a court of competent jurisdiction, or to the comparative cost and convenience of proceeding in one place rather than another. We do not know, indeed, of any statute, decision, or rule of court which prevents an Irish judge from considering these matters. But the maxim *boni judicis est ampliare jurisdictionem* is one dear to the judicial mind; and there can be no doubt which way a discretion of this sort will be exercised, unless its exercise be positively restrained.

In a third paper we shall compare the Scotch law on this subject with the English and Irish, and refer to the law of domicile founded on agency or branch office.

NOTES ON THE EDUCATION FOR THE SERVICE OF THE STATE IN CONTINENTAL COUNTRIES.

I. RUSSIA.

THROUGH the exertions of Professor Lorimer a series of interesting replies to a paper of queries as to the present condition of the education of persons desiring to enter the service of the State, and its relation to the universities in the principal countries of the Continent, was obtained for the Scotch University Commissioners. The Commissioners have not found space in their report or its appendices for their publication, but they are much too valuable to be lost, and having been placed at our disposal, we propose to communicate their results to our readers, supplementing the information they contain from other sources. In giving these answers we must be deemed simply reporters of the evidence of highly qualified witnesses to the facts, and of persons whose opinions are well entitled to consideration. For ourselves we echo the wise remark of Professor Pauli in his evidence before the Commissioners: "I am thoroughly convinced that just as it is impossible for the Germans to transfer the English Constitution to their political institutions, so it is impossible that their educational system can be transferred to English or Scotch institutions; but by comparing the two systems a set of conclusions may be reached."¹ What these conclusions are—how far, and in what manner Great Britain may adapt to its own circumstances the political education which every Continental country has introduced—we defer considering until we have stated the evidence now for the first time placed fully within our reach. It comes from all countries—Belgium and Holland, France, Germany, Switzerland, Russia. It is given by persons whose position and experience entitle them to speak with an authority which it is no disparagement to our own countrymen to say is possessed by not many of the witnesses whose evidence the Commissioners have published. For the present condition of

¹ Evidence before the University Commissioners, 4892.

public affairs and the public service in this country is such that men of special knowledge in the departments which directly bear upon Government do not generally attain to a position equal to that which is open to the same class on the Continent. The consequence of this is that they have not the advantage of practical training in the work of administration and government, so that our men of science lack experience, and our men of practice lack knowledge.

The subject with which these questions and answers deal is strictly appropriate to a legal magazine, for no civilized country except our own at present supposes it possible that good servants of the State, from the highest rank of the prince or the statesman to the lowest grade of the public service above that of the mere copying clerk, can be procured without some (of course differing in extent in different classes) systematic education in law—"that study," to use the words of Mr. Kemble, "which, unhappily, our English gentlemen no longer think absolutely necessary to their education, the study of the law of which they are the guardians, though a professional class may be its ministers."

It is for the most part in the Legal Faculty of the universities, or in a subdivision of it where the studies are arranged with more immediate reference to political knowledge, that this education is acquired on the Continent; but acquired in some way it must be by every aspirant to political employment or political honours. It is now more than two centuries since Bacon noted in a remarkable passage of the "Advancement of Learning" the absence of any provision for systematic political education. "Neither is it to be passed over in silence," he writes, "that this dedicating of colleges and societies only to the use of professorial learning hath not only been an enemy to the growth of sciences, but hath redounded likewise to the prejudice of states and governments: for hence it commonly falls out that princes when they would make choice of ministers fit for the affairs of State find about them such a marvellous solitude of able men; because there is no education collegiate designed to this end where such as are framed and fitted by nature thereto might give themselves chiefly to histories, modern languages, books, and discourses of policy, that so they might come more able and better furnished to service of State."

When this was written the want was common to Europe; it is now peculiar to Britain, and it would be a task more easy than pleasant to point out in detail the disadvantages which this country suffers in domestic legislation, in administrative government, and in diplomatic action, from the fact that even the best educated Englishmen are in this respect on an average below the par of educated foreigners.

We propose to devote separate articles to the consideration of the state of political education in the principal countries of Europe, and we shall begin with one which some persons in this country regard as still half-barbarian, or at best as combining the vices of

barbarism and civilization—Russia. The sedulous cultivation of jurisprudence in all its branches, and especially of international law, can scarcely, however, be reckoned amongst these vices except by those who have attained to that cynicism which is one of the worst of the vices of civilization. We do not wish to conceal our own opinion that the Russian Empire has made during the present century, at a great sacrifice of the special interests of classes and individuals, and in spite of serious obstacles, an advance towards good government which deserves the recognition of fair observers; but to those whose opinion differs from ours we commend the Roman proverb, "*Fas est ab hoste doceri.*"

We are indebted for the information as to Russia to a well-known publicist, F. Martens, Professor of International Law at the University of St. Petersburg, and of Public Law at the Imperial School of Law in the same city. Attached to the Ministry of Foreign Affairs since 1868, and sent as delegate of the Russian Government to the Conference of Brussels in 1874, the testimony of this gentleman is that not of a mere professor, but of a practical diplomatist. Besides his Russian works on the "Rights of Private Property during War," and on the "Problems of Modern International Law," he is the compiler of a very useful collection of the "Treaties and Conventions between Russia and Foreign Powers," three volumes of which have been published in French.

He is only one, though no doubt one of the most eminent, of the distinguished jurists whom the Russian Government has the wisdom to employ in the service of the State. This is a class whose existence may perhaps have as much to do with the acknowledged ability of Russian diplomacy as the character for *finesse* to which we are in the habit of attributing it.

In answer to the inquiry, Whether there are any branches of the Civil Service of the State for which (1) attendance at a university or universities for a certain period, or (2) the possession of an academical degree, is either indispensable or taken into account in judging of the qualifications of the candidates, M. Martens states: From the time of Peter the Great there have existed in Russia fourteen ranks of officials (the *Tchinovik*, with whose position the English reader is now familiar from Mr. Wallace's "Russia"); and specially from the beginning of last century, when all the Russian universities, except that of Moscow, were founded, the possession of an academical degree gives *ipso facto* a right to a rank in the Civil Service of the State. The possession of the lowest academical degree, called Actual (or Effective) Student, confers the twelfth rank in the Civil Service; the second degree of Bachelor the tenth rank; the third degree of Licentiate or Master the ninth rank; and finally, the highest degree of Doctor confers the eighth rank. In this way every one who has passed the University and gained one of the above-mentioned academical degrees has the right to enter any branch of the Civil Service, and is immediately confirmed in

the civil rank to which he has right according to his diploma from the University. For the judicial or legal professions it is specially required that the aspirant should have the qualification of an actual student or candidate of the Faculty of Law. Exceptions are, however, made in favour of lawyers who have not got an academical degree, but have practised in the Courts. In order to obtain one of the above-mentioned academical degrees it is necessary to pass at least four years at the University, and, in the case of aspirants to the judicial profession, in the Faculty of Law. But degrees in the other faculties, for example in that of mathematics and physics, also give right to the corresponding rank in the Civil Service, and naturalists may become very good officials. In the diplomatic and consular services there are also officials who have taken their degrees in mathematics and physics or in classics and history (the German Philosophical Faculty). Our Foreign Office further requires every candidate for the diplomatic service to pass a special examination before the Council of the Foreign Office. This Council is composed of the heads of the departments and other persons specially named by the Chancellor of the Empire, and is under the presidency of the Under Secretary for Foreign Affairs. The examination, which is both written and oral, is conducted usually in French. The subjects are French and Russian; International and Maritime Law and the History of Treaties from the time of Catharine II.; Political Economy and Statistics. No person who has not passed this examination is admitted to service in the Foreign Office, in the Asiatic Office, or in Embassies and Consulates abroad. For these branches of the public service an academical degree is not indispensable, but practically it is very useful to those who wish to rise in the service.

The Faculties of Law at the Russian universities are divided into a legal and an administrative department. The former is attended by lawyers, whether intended for the judicial or legal profession, the latter by students who propose to enter the administrative or diplomatic branches of the public service.

It is necessary to add that besides the universities there are at St. Petersburg two institutions which give the right to enter immediately with a definite rank into the State service. These are the Law School and the Lyceum, the first for the judicial and legal professions, and the second for the administrative and diplomatic service. The subjects taught in them are almost the same as in the Faculties of Law in the universities, and they have almost the same professors; but in the universities the political and legal sciences are more completely studied. To these answers, which we have given almost in the words of M. Martens, he adds in a private letter, "In my answers you will find an exact account of the state of things which exists in my country. But if you ask my opinion *de lege ferendâ* about the highly important question as to the relations between the Civil Service of the State and the universities, I

must tell you quite plainly that I am convinced of the necessity of having an academical degree in order to go up in the scale of the Civil Service of the State. I believe that an intellectual sense is indispensable for every official who wishes to be a statesman and of use to his country, especially in the diplomatic service and the consular service. I think it quite necessary to require knowledge of International Law, Political Economy, Statistics, History, and also of the Constitutional Law of the principal foreign countries. That opinion I have attempted to explain in my work, translated into German under the title '*Das Consulat Wesen und die Consular Jurisdiction im Orient*,' Berlin, 1877, chapter vii. p. 571. I have there tried to show that it would be useful, especially in the East, if an academical degree in the Faculty of Law were necessary for the diplomatic service. In our Foreign Office, as I have stated, there is a special examination, and an academical degree is not required, though its possession is always a great advantage practically almost in every department. But it would be better, as I humbly think, if that state of things were sanctioned and definitely carried into effect."

In order fairly to estimate the immense advance which such a system as has been adopted in Russia, and such views as those M. Martens indicates, show in regard to the necessity of a thorough and systematic education of the members of the public service in Russia, it is necessary to bear in mind how comparatively recent the whole system of university education in that country is. The first Russian university, Moscow, was founded only in 1775, at least six centuries later than Bologna, Paris, Salerno, and Oxford. "There were then," says an intelligent French writer, M. Hippeau (*Instruction Publique en Russie*, p. 277), "few persons prepared for a university education, so the new establishment ran the risk of being without students. To form students capable of following academic classes two gymnasia were instituted, which were attached to the university and placed under its direction."

Yet in a single century seven other universities have been founded, St. Petersburg, Kharkoff, Kazan, Kief, Odessa, Dorpat, and Warsaw, the number of whose students was in 1873 nearly 7000, of whom 2720 were students of law. Besides these universities in Russia proper there is that of Helsingfors, formerly at Abo, in Finland, and two important institutions for the study of law, one the School of Law at St. Petersburg, and the other the Demidoff Lyceum at Yaroslaf. Russia is about the only European country which did not receive any part of the rich legacy which the mediæval Latin Church bestowed on modern Europe by its creation of the university. The Eastern, unlike the Western Church, has done nothing for education, and the gross ignorance of its clergy is one of the most difficult problems with which Russian statesmen have yet to cope. But it has been some compensation for this loss, that when the university system was at last introduced it could be formed in a manner more corresponding to the needs of a modern state.

Even after their introduction the Russian universities have had great difficulties to contend with, and especially two which cannot be said to have been yet entirely overcome—over-regulation on the part of the Government, and, as a natural reaction, revolutionary ideas on the part of the students, and in some cases of the professors. Their brief history has had many vicissitudes, but their present position under the law of 18th June 1863, by which they are at present regulated, gives fair promise for their future.

This law was the result of the labours of a commission issued by the present Emperor in 1861, when Russia had recovered from the exhaustion consequent on the Crimean War.

According to the law which was prepared by a commission of eminent Russian educationalists, who submitted it in proof for suggestions from competent authorities in the different countries of Europe, there are now four faculties in each of the eight universities. These faculties are (1) Philology, or Languages and History; (2) Physical and Mathematical Science; (3) Law; and (4) Medicine. But in St. Petersburg a Faculty for Oriental languages takes the place in the University of Medicine, which is taught in a separate institution.

The Demidoff Lyceum at Yaroslaf and the separate Law School at St. Petersburg have, we believe, a curriculum nearly as ample as that of the universities. When we state the subjects that are taught in the Law Faculty, it will probably be thought that the system errs rather on the side of excess than defect; but it must be kept in view that students select the particular subjects appropriate to their future destination as practising lawyers, or as servants of the State in the variety of careers, administrative, judicial, and diplomatic, which the wide extent of the Russian Empire opens to its subjects.

The following are the branches taught in most, if not in all, the universities:—(1) Encyclopædia of Law, under which name is included, as in Germany, a general introduction to the circle of legal and political studies; (2) Roman Law; (3) Political Economy and Statistics; (4) History of Roman Law; (5) History of Foreign Legislations; (6) History of Slavonic Law; (7) Administrative Law, both Russian and Foreign; (8) Civil Law of Russia; (9) Criminal Law of Russia; (10) Police Law; (11) Financial Law; (12) Ecclesiastical Law; (13) International Law.

When it is added that in the Faculty of History and Philology there are three chairs of history and one of philosophy (the subject which is least adequately provided for), it will be seen how fully the branches of knowledge which bear upon Government are represented in the higher education of modern Russia. The system of examination, in addition to a preliminary examination which gives the title of Effective Student, has three degrees, Bachelor, Licentiate, and Doctor. For the two first an examination must be passed, and for the two last a thesis on a subject approved by the Faculty must be presented.

Æ. M.

ON CERTAIN PRINCIPLES AFFECTING THE LIABILITIES OF MASTERS AND SERVANTS.

NO. V.

PASSING on then, as we proposed, to the evidence of those employers who seemed not averse to a change of some kind in the law of liability for injury, we find (Report, p. 35) the chairman of the Mining Association of Great Britain advocating strongly what he terms the principle of "joint interest and joint responsibility." He expressed the opinion that were it made the direct interest of each and all to keep things safe and in good order, no better protection against accidents could be devised. The Select Committee of the House of Commons, which so long back as 1835 inquired into the subject of accidents in mines, recommended that measures be taken "to employ every effort to make the workmen acquainted with their individual responsibilities, and those theories and principles, both as regards lamps and proper ventilation, upon the observance of which their personal existence and that of their comrades are at stake." Better education would lead to greater steadiness and self-reliance, Mr. Fereday Smith thought, and obviate the errors of judgment as to their true interests they were, he considered, at present liable to embrace. Generally speaking, however this witness took up the ground of contract, that is to say, that the workmen could not fail to be aware that even under most exceptionally good management, and with every care, the character of their employment was highly dangerous; while, at the same time, the manager or, if it be a small mine worked by himself, the owner runs a similar personal risk. He added, "The essential principle that really pervades the position of the parties is, that the great bulk of them are practically partners with the masters, namely, that the wages rise and fall according to the state of trade; but the moment an accident happens, no matter by whose fault, we hear no more of the partnership." Further on the same witness laid great stress on the importance of rendering workmen self-reliant, not uniting together for the purpose of shifting responsibility, but taking their share of it, and the suggestion already alluded to of an insurance or benefit fund was clearly made in these terms: "I should welcome a legal enactment constituting either for the county or the district, or even for the colliery, a large benefit society based upon a rate per man or per boy employed, to which the owner should be compelled to contribute weekly a fixed percentage, and to which every person employed in a mine should be compelled also to contribute; and the master should not be allowed to employ any one who did not contribute. The funds should be managed by a joint committee of master or manager and workpeople; and it would be the direct interest of every person in the mine to prevent his neighbour from doing what might cause an appeal to this fund. A committee should

hear applications for a relief from it; but the greatest care should be taken in framing the rules to prevent improper applications from being acceded to. I would suggest that the relief should not be of such a class as to be considered as compensation, but rather as relief only. I put it on the principle of relief, and not on the principle of compensation."

It appeared to be the opinion of Mr. Fereday Smith that if the principle of Mr. Macdonald's Bill were adopted the working of minerals would (owing to the uncertainty caused by such a heavy pecuniary liability) fall into the hands of men without capital, who would, from purely speculative motives, venture to run the risk. Several classes of proprietors would have to be embraced in legislating towards this end. Thus some mines are owned by single and wealthy persons, who work them by means of a manager; others are the property of companies whose liabilities are limited by statute, and whose capital may be entirely paid up; while there are also small owners of small collieries acting as their own managers. What was deemed to be the danger of changes in this direction, even apart from these legislative difficulties, was exemplified by the manner in which the Mines Regulation Act had raised the price of coal by increasing the cost of working. Any combinational or legislative obstacles would produce this effect. Another witness said (Report, p. 48) that he thought that masters acting as their own managers and working the pit themselves had not the same inducements to regard the safety of their workmen as paid managers had.

This, it was explained, was due to the temptation to save expense, ever present in the former instance, and causing so little pecuniary injury were an accident to happen; whereas in the latter an accident proved to have been caused by the manager's failure to keep the plant in proper condition might ruin him utterly. Mr. Craven (Report, p. 104), a large employer of labour at Leeds, was quite willing to extend the law of liability so far as to make a master who deputed his duties to another as manager liable for that deputy's actions just as though they had been his own, and to the same degree.

It is a curious and remarkable thing, brought out by the evidence of Mr. Firth, that apparently the miners have themselves stood in the way of mechanical inventions calculated to reduce the risk of accidents. Mr. Firth (Report, p. 53) said: "I have spent much time and money in making machinery for the purpose of diminishing the risks which are incidental to coal-mining. I refer more particularly to machinery for *undercutting the coal*, so that the labour of hand-getting might be nearly dispensed with. *I have succeeded mechanically, but the commercial success has been interfered with, mainly through, as I believe, the men having been led to consider the machine as opposed to their interest.* I worked the machine in our colliery for ten years, and there was only one serious accident, so far as I am aware, to any of the men who attended the machine

during that whole time, and that accident happened to a poor man who neglected to set up a prop which he had been told to do, and the roof came down and he was killed. One great purpose of the machine is to reduce the danger which comes from falls of roof and coal, so numerous and fatal in hand-getting, and to ease the labour of hewing. The accidents from falls of roof and coal amount to about forty per cent. of the total accidents of the coal-mining. The action of the miners' union has been the greatest difficulty that I have had to contend with, and although, commercially speaking, my work has been baffled, I feel perfectly confident that in spite of them it will ultimately prevail." The mode in which liability, as between master and workmen, should be adjusted, according to this witness, was to render the master liable for negligence, even, for example, in case of an explosion caused by his manager's fault; but, on the other hand, to render also the funds of a union to which a workman might belong liable for culpable damage caused by him. At the same time the witness candidly said that if the owners also had a union and a fund, and one of the partners in this fund caused an accident by his negligence or fault, he was prepared to render that fund also liable just like the trades'-union fund. As regards the effects of Mr. Macdonald's Bill, were it to become law, Mr. Firth thought there would be a constant stream of litigation as to accidents and liability for them, and that probably there would arise a combination of the mineowners, at first merely for the purpose of establishing a mutual insurance fund and resisting these claims, but terminating possibly in purposes of a much wider range. One peculiar effect too, of rendering a union liable because a person who subscribed to it was culpable may be noticed shortly here. If such a doctrine obtained effect there is not any clear reason why a shareholder of a company should not by his individual act render all his fellow-shareholders liable; and thus (taking as an example the case suggested by one of the committee) any person possessed of a few shares, and working in the colliery, might by his negligence render the whole proprietary of the company liable. It was shown clearly that in some instances the most disastrous consequences might result from causes entirely beyond the control of any management, and these instances were naturally adduced in support of the arguments as to the uncertainty in fixing liability, and the tendency a change might have. We quote from the Report: "One particular instance, where a man was working in a place in Heburn Colliery, and suddenly, without any notice whatever (the man was working with a safety lamp), an *immense quantity of gas came off, which was so strong as to blow away twelve tons of solid coal out of its position between the roof and the thill, and to foul the place for hundreds of yards.*"

Of course as to the general cause of accidents, or the cause at least of the majority of them, there is necessarily much difficulty and doubt, because the only persons who could speak positively are

in most instances among those who have perished ; still, one of the witnesses, a mining engineer, spoke out strongly, and expressed his opinion that negligence on the part of some workman was the source of the accident in the majority of cases traceable to human agency. The negligence had nothing to do with the employment, and even arose out of acts at once unnecessary and inexpedient for the purposes of the employment. "For instance," he proceeded to say, "a workman might negligently *strike a light in a dangerous place* where safety lamps were used, or *expose a candle*, or *negligently run over a fellow-workman* while driving waggons, or *leave a door open when it should be shut* ; and there can be no reason why the owner should be held liable in such cases. The miners are quite cognisant of the risks that attend their employment. Then, again, most accidents occur from some unavoidable cause, which neither the servant nor the master can possibly foresee, such as explosions of fire-damp, drowning out of a mine by a sudden rush of water, or a sudden fall of stone. In all these cases there is not a moment's indication of what is about to happen ; and yet if the law be altered as suggested, *in all these cases questions will be raised and endeavours made to trace them to some breach of duty devolving upon the master* ; and this would create differences between the men and their employers. The question would have to go before a jury for determination, a tribunal which always more or less sympathizes with the sufferer ; the expenses incurred in a case of a serious misfortune might be enormous ; and in no case, when the master was shown in the end to be right, could he have any means of recovering from a mere workman the costs of such an inquiry. These cases would be taken on the *chance of success by speculative lawyers*, and so the owner would be involved in a mass of litigation which he had no means of preventing." The fear of the law and the sharks of the law indeed seems to press heavily upon all those who appeared before the committee, some of them, as we have already shown, having been smartly bitten, and probably retaining vivid recollections of olden days, not entirely recollections of unmingled satisfaction.

We now conclude the evidence given by gentlemen who appeared on the employers' side of this important question, by referring to the observations and suggestions made by Mr. Robinson, a partner in a firm of locomotive engineers in Manchester (Report, p. 97), and of Mr. Wren (Report, p. 103), also an engineer in the same place. Both these gentlemen approved of there being in all works or mines some recognised and responsible person, and for his acts they were ready to see the proprietor or owner rendered liable. Notice of the registration of this person as manager should, it was suggested, be posted up at the entrance to the works, so as to render every one perfectly cognisant of the position of matters, and so as to precisely define the employer's liability. This registration would be compulsory, and the only way to avoid it on the employer's part would

be personally to undertake the management. Further powers might be conferred upon the Government Inspector to require the registration of the real manager if he became satisfied that the person so registered had no real control, and was really only there, as serving the purpose of evading the liability law. Beyond this point both these witnesses thought the law should not be extended; one of them, Mr. Robinson, said he did not think any further extension would diminish the number of accidents, while it would increase the cost of production, and so place this country at a disadvantage with foreigners. There are also, he pointed out, certain dangers to workmen in the engineering trades (as indeed in all others) which only the workmen themselves, by their technical and special knowledge, can avoid in the safe execution of their work. Some of these were enumerated as follows:—"Putting on and taking off driving belts, starting of engines after meal-hours, and repairs; the use of lifting tackle, chains, and ropes; the use of cranes, with chains and breaks; the use of steam-hammers in smitheries, the detection of flaws in materials, and such like." To alter all this would likewise, it was thought, create litigation and ill-feeling not now existing, and to a large extent obviated by benefit societies everywhere to be found, and to which the employer usually contributes considerably. These contributions, and others often made, we can see would in many cases at once cease through the fear of new and more dreaded, because less tangible, calls upon the master's purse. If any change were carried beyond the registered manager, it was pointed out that a difficulty at once must arise in drawing the line. Foremen and sub-foremen have a certain charge of certain works, and have men under them, yet their duties often, so to speak, "overlap each other; one man's duty does not end where another begins:" once go beyond the single manager and you get into a sea of troubles. We may also observe that it would be another source of difficulty in this matter if the same owner had various branches of his business all overlooked no doubt by a manager, but with subordinate officials in charge of each. Really these would be as separate works, often practically they are so, and the sub-manager in charge of each should be registered in place of or along with the principal manager. This is merely alluded to as showing what difficult questions might arise out of Mr. Robinson's suggestions.

We have seen, then, the more moderate among the employers themselves taking this view, and accepting with readiness, or at least looking forward without much alarm to a change as regards delegated duties exercised in the person of a manager. On the other hand, among the workmen and those who appeared before the Committee in their interests there have been also found those who took a view whereby simply the defence of "common employment" was to be struck out of our list of legal pleas, and the whole questions of neglect or mismanagement placed before a jury. The discrepancy between these two classes of witnesses is pretty con-

siderable at best. One says we would render the employer liable for what he does, whether he does it himself or by means of a registered manager; and if he does not conduct his business in person we would by law compel him to register a manager, and would further provide means to secure the workmen in their position so far that the registered manager shall be the actual working man in charge. The other says we will get rid of a doctrine at variance with common sense, a doctrine which holds that a manager and every man in the colliery in his charge are all fellow-servants. By removing this obstacle we shall preach the real merits of any question, and if there has been neglect on the part of manager or overseer we shall hear of it. The difference, however, of course really turns upon grades lower than that, for once abolish the defence of "common employment" in this sweeping way and the actions that may be brought against the owner or employer will be practically unlimited. "I would not say what the liability should be, I would leave that to the jury" (Report, p. 13). This is a complete summary of the position taken up by the employed. An explosion on this assumption could not in ordinary circumstances take place without liability being incurred, because the working of the colliery should not have been carried on under such atmospheric conditions so dangerously delicate that a slight change one way or another would suffice to turn the balance and convert a prospective into an actual peril.

One party would have no man rendered liable save for his personal act, the other would make the employer in all cases liable where there had not been contributory negligence on the part of the victim. Has the law recognised either of these views? We fear not. The present position is not truly logically tenable, for there is recognition of neither principle, yet in part of both. Let us see what the lawyers who were examined had to say for themselves upon this point, what opinions were expressed by the eminent judges and counsel who appeared before the Committee in 1876 and 1877.

Since these articles began to appear the whole matter has been very carefully and elaborately discussed in the correspondence columns of public journals, probably owing to the interest awakened by the debate raised in the House of Commons upon Mr. Macdonald's Bill; and it will be necessary to devote accordingly some attention to the arguments used in the House and by the critics of the debate even when briefly endeavouring to sum up the results and character of the evidence given by the jurists before the Committee. At the outset it may be observed that the principle of the exception now allowed to the otherwise usual rule makes the master liable where his servant has committed default in the course of his employment. These very words give rise at once to considerable difficulty, for it may be asked what is "the course of his employment"? One legal witness in

trying to answer this question gave two examples, showing admirably how narrow is the line, and how technical must be any attempt to define the term. A servant drives a cart negligently through a town and he causes damage. Here the master is liable, even though proof be given that the cart had no business to be in the town, and was not to have been there in fulfilling the commission of its driver. Again, when his day's work is done, a servant drives a fellow-workman without his master's knowledge to the station; an accident occurs, but the master is not liable. In both these examples the master had exercised and could exercise no control over the act of his servant, in both of them the servant was doing what he had no business to be doing; yet as in one case his day's work was done, he was not following the "course of his employment," whereas in the other he was within that term though he actually did what was beyond it. Yet again even this rule of law, rendering the master liable where the default is committed by his servant in the undoubted course of his employment, has also an exception in the doctrine of "common employment," already discussed by reference to the Scotch cases upon the subject. It would occupy too much space were we to attempt any sort of statement of the English cases upon "common employment," so varied and numerous are they; but Mr. Ilbert (1876 Report, p. 23) selected a few of them in these words: "A chief engineer and a third engineer on board a steamer; a labourer employed in loading bricks and a deputy foreman of platelayers; one of a gang of scaffolders and the foreman of the gang; a carpenter and joiner employed in painting an engine near a turn-table, and the company's servants engaged in managing traffic, who negligently turned a carriage on the turn-table and upset a ladder, whereby the painter was thrown down and injured; a miner and an underlooker, whose duty it was to superintend the mining operations, and a workman employed by an engine-maker; and the foreman, who ordered him to get on a travelling crane, moving on a tramway, which fell and injured the workman." But our law has by this time travelled away beyond such a point, and has since *Wilson v. Merry & Cunningham* devised a means of almost, we might say, "explaining away" common employment. The new basis found for the rule of exemption of masters from liability is in the doctrine of "implied contract," that is to say, that the workman must be presumed when making his bargain with the employer to have had in view the risks of the undertaking, and so in accepting the wages to have done so as partly in lieu of such risk. Mr. Macdonald accordingly introduced words into the first clause of his Bill to meet this doctrine. In two very recent cases this question of implied contract as a means of getting over the legal difficulty has cropped up conspicuously. The first of these decisions was that of *Lovell v. Howell*, pronounced in February 1876. As to the circumstances of the case it is not necessary to say more of them

than that the action was at the instance of a lighterman, who was employed in bringing and mooring barges at a corn-merchant's wharf, and met with an accident through the fall of a sack dropped upon him by the negligence of another of the defendant's men when he was passing through the warehouse on his way to the corn-merchant's office to which he had been summoned. Of the judges who tried the case, Mr. Justice Brett expressed "a difficulty in understanding or in defining" the precise principle on which the immunity of the master in these cases rests." But previous decisions his Lordship said had settled the point, and he added, "I feel bound, however much I regret it, to decide against the plaintiff." Another judge, however, Mr. Justice Archibald, put the principle thus: "When a man enters the service of a master he tacitly agrees to take upon himself to bear all ordinary risks which are incident to his employment, and amongst others the possibility of injury happening to him from the negligent acts of his fellow-servants or fellow-workmen. Thus we see clearly the whole affair rested upon tacit agreement or implied contract."

In the same month and the same year as *Lovell's* case there was also the case of *Allen v. The New Gas Company*, in which a peculiarity existed. The manager of the company noticing the dangerous condition of certain gates on the premises ordered them to be repaired, but the order had not been carried out, and the fall of the gates injured Allen. Baron Huddleston pointed out that "the mischief arose from the conduct of the plaintiff's fellow-workman as such, and not from the defendant's fault, nor from the default of any manager or vice-proprietor." This observation was of course quite beside the question, because in the existing state of the law a manager is simply a fellow-workman as regards claims for liability through him against the employer of labour. If a change, however, in the rule were effected by statute, the case may be regarded as a useful illustration of a state of circumstances where even the responsibility for the act of his manager would not, or at least might not, have involved the liability of the master. The manager's orders for repair were in Allen's case given; he had done all that lay in his power to obviate danger; the neglect did not lie at his door; and he would probably have been held free, and so through him, even under altered legal rules, the master. Two questions, however, occur to us forcibly in this aspect of the matter, and we may ask them perhaps pertinently and fairly at this stage of our inquiry. First of all, when "ordinary risks" are spoken of is it quite reasonable to regard the careless, foolhardy negligence of a fellow-workman as an ordinary risk? secondly, why should we imply this tacit agreement has been made when we deal with the case of a master and servant, whereas, if it be the case of a carrier and a passenger, there is no such legal implication? Let us pause for a moment and inquire what modern nations other than our own say in their legal systems as to this exception in these questions

of liability. We find that this is a peculiarity of the law of this country, found only in the United States, and there only in the laws of some of the component States, laws of course all ultimately derived from our own. Even here in Scotland the law has been forced out of its own channel to make it mingle in the wide if more intricate current of English jurisprudence. If we cross the Channel and seek for the doctrine we now recognise, France has it not. Her code provides (Art. 1384) that a person is liable not only for the damage which he causes by his personal act, but also for that which is caused by the act of those persons for whom he ought to be responsible, or by those things which he has under his charge. Then follows the important passage in these words: "Les maîtres et les commettans (sont responsables) du dommage causé par leurs domestiques et préposés dans les fonctions auxquelles ils les ont employés." It further provides that this responsibility shall hold good unless the person upon whom it is cast can prove that he was unable to prevent the Act which gives occasion for this responsibility. This last provision would, however, seem to provide a loophole of escape for the employer. Italy follows France, and in Germany the rule of *Priestly v. Fowler* is unknown, although in the case of carriers both by land and by water a general liability has by statute been introduced. We shall simply give the two Articles quoted to the Committee. Art. 1: "Where in the course of the working of a railway a man is killed, or suffers personal injury, the undertaker is liable for the damage thereby caused so far as he does not prove that the accident was caused by *vis major* or by the default of the person killed or injured himself." Art. 2: "Where in the case of a mine, a quarry, a pit, or a factory, the agent or the representative, or person employed to conduct or overlook the work, or the workmen, through his default in carrying out the work, has caused the death or the personal injury of any man, the owner is liable for the damage thereby caused." This liability cannot be got rid of by contract, such agreements being deprived of all legal effect. The law thus in Germany is very strongly developed in the direction of liability.

If we turn back to the Roman law the liability was restricted to the price of the slave who had caused the accident, for the owner might in his option pay the damage or give up the slave to the injured person. Mr. Joseph Brown, Q.C., in an interesting pamphlet upon this subject published in 1870, and entitled "The Evils of the Unlimited Liability for Accidents of Masters and Railway Companies," quotes from the Institutes of Menu, the ancient Indian lawgiver, in support of his contention that only the careless hiring of an incompetent foreman should give ground for liability. Menu laid down that where a carriage has been overturned by the unskilfulness "of the driver, then, in case of any hurt, the master shall be fined 200 panas; that if the driver be skilful but negligent, the driver alone shall be fined, and those in the carriage shall be fined

each 100 panas if the driver be clearly unskilful." It is not necessary for the purpose we have in view to go further into an inquiry as to the laws of other states, modern or ancient; these examples will sufficiently illustrate the tendency of jurisprudence abroad. But as we have referred to a pamphlet on this subject, it may be interesting to note what terrors are held out for masters under an unlimited liability, and what mode the writer suggests as a remedy. A few sentences will enable us to see in a general way what this remedy is to be. Premising these observations with a reference to the number of compensation cases already crowding the rolls of the English Courts, it is pointed out that other and more important business must necessarily be delayed. "Is it just," he then asks, "is it politic, that the penalty almost always falls on one who is perfectly innocent of any blame?" Putting an extreme case, it is shown how a whole fortune might thus be lost without fault or blame; and taking the standard of the criminal law, *respondere superior*, it is argued, should only apply where the act of injury has occurred through the servant's following his master's orders, not where he has exceeded or disobeyed them. As to the policy of the rule we find it summed up thus: "The truth is, that the law saves itself the trouble of making summary and effectual provision for punishing negligent servants, and compelling them to pay for the mischief they have done (by a compulsory weekly deduction from their wages) by turning over the injured person to the master for compensation, careless of the fact that he is blameless. It almost reminds one of some half-civilized nations in Asia who, when one of them is accidentally killed by an Englishman, demand a victim from our countrymen, but are careless whether he be the real offender or not, so long as he is an Englishman."

What, then, is Mr. Brown's remedy? It is found in assigning a limit to all liability in which the fault of the master is not an inherent part. This would stop the "fraudulent and dishonest attempts which are constantly made in courts of justice to swell up the damages to a fictitious amount." We cannot but feel how true this is, and how many concocted and speculative cases adorn the courts of justice will be probably guessed by even a somewhat cursory perusal of the calling lists. Further, it is pointed out how the "Merchant Shipping Act," 25 & 26 Vict. c. 63, s. 54, limits an owner's responsibility to £15 per ton whatever the damage done; while a similar observation will apply to limited liability companies and their partners under the acts relating to joint-stock companies.

The difficulty we feel in applying such a remedy is this. A fixed amount of liability would itself act inequitably, for although the sum recoverable were even made as low as £200, this, to large owners or rich masters a mere bagatelle, would almost perhaps altogether ruin many a poorer employer. The pamphlet we have before us concludes by deprecating the principle of compensation

for railway accidents according to present rules. "Even the law, which is hard enough on railway companies, denies any absolute engagement to carry passengers safely, and only implies an undertaking to use due care. A contract to carry safely would be equivalent to an insurance." We cannot think this matter can be so readily disposed off, for it must be remembered that we have granted to railway companies, and that under statutory concessions, what is practically a monopoly of our traffic, whether of passengers or of goods. Great powers have been conferred upon them, and in return for such special and exceptional privileges come, as they always do, special liabilities. Hereafter the doctrine of an implied contract, as to risk of accident in the employment of a servant by his master, will have to be considered, but it scarcely seems a great hardship that railway companies should be presumed to have accepted such a liability. It is not quite the same thing to apply to a railway journey made under these conditions the observation that might be made on a balloon accident, "What else could he expect?" merely because such might have been the remark of those to whom forty miles an hour was an incredible speed. Probably our fathers would have been scarcely satisfied had the security of their own stagecoach been placed upon the same footing as that of a balloon, and yet our railway carriage is to us what the stagecoach of the last century was to those who lived then, just as, perhaps, some other mode of locomotion may be in years to come.

(To be continued.)

Reviews.

A Digest of the Law of Scotland relating to the Poor, the Public Health, and other matters managed by Parochial Boards. By JOHN GUTHRIE SMITH, Advocate. Third Edition. Edinburgh: T. & T. Clark. 1878.

THE lapse of eleven years since the last edition of Mr. Guthrie Smith's book appeared has renewed the demand for his useful compendium of the Scotch Poor Law. It now appears in an enlarged and more substantial form, having an important chapter added on the duties and powers of Local Boards in carrying out the Public Health Act of 1867. On the subject of the Poor Law proper there has, to the regret of some, been no recent legislation, and therefore it was only necessary to bring down to date the decisions of the Court by which this branch of the law is elucidated. It is strange that there should be room for so much litigation in a department which starts with a code little more than thirty years old, and in regard to which it has frequently been observed on the bench that the great object is to deduce clear broad rules from the statute for the guidance of Parochial Boards, not to build up a

system of jurisprudence from first principles. Arguments as to the hardship of throwing the support of a pauper in any particular case upon one parish instead of another have little weight, for the parish that escapes in one case will suffer in another; and the saving to all parishes by adherence to distinct rules without having recourse to litigation will more than compensate individual cases of so-called hardship. When important general questions arise we do not hesitate to say that in the long run a judgment of the Court will be found the most satisfactory, and generally the cheapest mode of settlement, with this additional benefit, that the result is available as an authoritative guide for Parochial Boards in future.

These remarks apply to the vexed questions of the acquisition and loss of settlement. Birth, marriage, parentage, and residential settlement have each their several rules, giving rise in individual cases to most perplexing problems. Residential settlement has, however, made a new departure in the last few years by the admission of the idea of "constructive residence," against the strong dissent of Lord President Inglis and other judges. He, very much for the reasons already indicated, preferred to adhere closely to the language of the statute, which prescribes continuous residence, and to deny that this was complied with where a person, though having a house and family in one parish, was actually present, and lived and worked from day to day in another, although with periodical visits to what in common parlance would be called his "home." Constructive residence, however, has been recognised in the case of the sailor, the fisherman, the tradesman absent for months in his master's employment, and the farm servant living in a bothy throughout the week, but having a house and family in another parish. It would appear that the Court has been drawn into this line of decision partly from the analogy of domicile, where, unlike the Poor Law, intention is an important element. The general principles of the Poor Law, too, which it was thought impossible entirely to disregard in construing the language of the statute, seemed to point in the same direction. The parish that benefits by the industry should support the workman when he falls into decay; and it is said that the parish benefited is that in which the wages are spent upon the wife and family and house. But it cannot be doubted that these judgments have laid the foundation for most perplexing questions, where a strict rule, more easy of application by those to whom the administration of the Poor Law is committed, might have been laid down. Other questions, particularly affecting derivative settlement, have recently been the subject of discussion, and it appears that the points now arising are ever becoming finer and more intricate, and stand more in need of broad rules capable of ready application, without too much regard to supposed individual hardship.

The various other subjects falling under the Poor Law, including valuation or assessment, receive attention in Mr. Smith's work; and

on the subjects mentioned there is in the notes a judicious selection from decisions of the English Courts, regulated by similar principles and statutes. We do not know why the chapter on the Insane Poor is not fortified, as in the former edition, by the insertion of the Lunacy Acts in the appendix, where it was convenient to have them collected.

On the subject of public health we have a serviceable chapter of twenty pages summarizing the statute, which is found in the appendix. It also contains a reference to the rules and recommendations adopted by the Board of Supervision for the direction of Parochial Boards, to whom the administration of this statute in less populous places is committed. And we have also numerous references to English decisions, throwing light upon the administration of the Statutory Public Health Law in England. This subject is becoming every day more important, and undoubtedly presents some problems of the greatest difficulty: How to protect the health and amenity of a locality without unduly hampering or crushing trades, which, though noxious, are legitimate and necessary branches of industry; how to dispose of the drainage of a populous locality without making rivers into sewers; how to regulate or enforce the consumption of smoke from manufactories. The appointment of Sanitary Inspectors and Medical Officers exercising the pretty ample powers conferred by the statute under the direction of Local Boards, and subject to the control of the Board of Supervision, seems the best way of beginning at least to purge the land of these sources of disease and death which have for so long gone on unheeded and unchallenged. And it is very wisely put in the power of the Board of Supervision to initiate proceedings in Court, with the concurrence of the Lord Advocate, to compel the local authority to do its duty in terms of the statute. This has been found most useful in cases where, from indifference or false notions of economy, the Local Boards folded their hands and did nothing. Thus the public have it in their power by complaint to the Board of Supervision to see that a supply of water or a system of drainage is provided in a locality requiring it, and so to secure that the statute does not become a dead letter through local inaction or opposition or parsimony.

Altogether, from the subjects dealt with by Mr. Smith, as well as from the manner in which they are treated, and the copious appendix of statutes and forms, this volume will be found very useful, not only by the professional lawyers, but by laymen, to whom, as members of Parochial Boards and Inspectors, the administration of the Poor and Public Health Law is intrusted.

Selections from the Judicial Records of Renfrewshire, illustrative of the Administration of the Laws in the County, and Manners and conditions of its Inhabitants. By WILLIAM HECTOR, Sheriff-Clerk. Second Series. J. & J. Cook, Paisley.

THIS second series, like its predecessor, contains a vast amount of

curious matters. A considerable portion may be more interesting to the inhabitants of Renfrewshire, but much is of general interest, especially to the legal profession. A chapter is devoted to the history of the Liars, a subject which at the present time is exciting considerable interest. The most striking part of the volume regards both civil and criminal procedure in the Courts of the Heritable Sheriffs. The punishments for all offences were pecuniary fines of great amount, which is explained by the fact that all the officials derived their income from this most questionable source. Whatever was the crime or offence, it appears that the accused was compelled to purge himself by oath. Instances are given where the tenants and inhabitants of a district were thus made to criminate or exculpate themselves on all the varied meshes of the game-laws. On page 104 it is related that fifty-two inhabitants of Kilbarchan, in 1716, were thus pounced on and made to swear to their guilt or innocence. The record sets forth that the great majority deponed *negative*; but the minute is relieved by an occasional confession, such as "confesses guilty of a *Duke* (sic) and a *Drak*," "acknowledges shooting a *cock*" (whether wild or tame is not said), "confesses a *small teal*," "deponed negative *except a dove*." The negatives were acquitted. Those who refused to swear, or failed to appear, or confessed guilt, were severely mulcted in large penalties to the Fiscal.

On page 117, Mr. Hector gives a formal libel at the instance of the Fiscal in the year 1721, charging a man with the crime of *murder*, the subject being a *horse*! There is a remarkable case given under date 1685, of a criminal libel charging assaults against two parties. The Sheriff found the assault not proven, but found the prosecutor and the two accused parties guilty of breach of the peace not charged, and fined the whole three in sums amounting to £250 Scots money. The quaint language of the indictment and some other legal proceedings, both civil and criminal, are well worth notice.

At pages 122 and 124, the author appears as stating that previous to 1825 and 1838, Sheriffs had no small-debt jurisdiction, and that the first maximum was £12. In 1825 Mr. Home Drummond, then member of Parliament, introduced the first Sheriffs Small Debts Act, 10 Geo. IV. c. 55; the next Act was the 1 & 2 Vict. c. 119, which was carried through Parliament by Mr. Robert Wallace, member for Greenock. But both these Acts fixed the limit at £8, 6s. 8d. (£100 Scots), and it was only in 1853 that the jurisdiction was extended to £12 by section 26 of Act 16 & 17 Vict. c. 80.

The volume is well and artistically got up, with plans and fac-similes of documents, and on the whole is creditable to the compiler, and valuable as a contribution to ancient legal lore. We wish that other custodiers of similar records would be incited to and do likewise by the praiseworthy exertions of Mr. Hector.

Obituary.

WILLIAM DRYSDALE, Esq., D.C.S.—We regret to observe the death of the above venerable Clerk of Court, which took place on the 20th ult. There was no better known official of the Court of Session than Mr. Drysdale, connected with it as he had been for nearly half a century. A native of Dunfermline, he came to Edinburgh in 1809, and was appointed an Assistant-Clerk of Session in 1829: in 1855 he was made Depute-Clerk. He possessed, as might have been expected, an extensive and minute knowledge of the forms of process, and was ever distinguished for courtesy of manners and geniality of disposition. A short time ago, feeling temporarily indisposed, he resigned office, but eventually withdrew his resignation and returned to his duties. Mr. Drysdale was in his eighty-sixth year at the time of his death, but was particularly hale and vigorous to the last. He will be much missed by a large and attached circle of private and professional friends, and the Outer House has in him sustained a loss which will not be easily supplied.

The Month.

Appointment of Chief Constable of the City of Edinburgh.—The Sheriff of Edinburgh and the Lord Provost have selected for the above post, rendered vacant by the resignation of Mr. Linton, Mr. William Henderson, Chief Constable of Leeds. There were, we believe, upwards of eighty candidates. Mr. Henderson has had much experience of police work in many of our large towns, and seems in every way highly fitted for the office. He has ample material on which to exercise his skill.

Solicitors Supreme Courts.—At a special general meeting of the Society held on the 14th May Messrs. David Morton and David Lyell were admitted members; and the following report by the Council of the Society on various bills before Parliament was approved of:—

“1. *Entail Amendment Bill.*—The object of this bill is to throw the burden of obligations undertaken by the institute or heir in possession of an entailed estate, in any lease or agreement relating thereto for the making of the improvements set out in the third section of the Entail Amendment Act, 1875 (38 & 39 Vict. c. 61), when such obligations have not been completely implemented prior to the death of such institute or heir, upon the succeeding heir of entail, and to relieve the personal representatives of the heir who has undertaken. The second section imposes a similar obligation upon the succeeding heirs of entail to relieve the personal representatives of all liabilities undertaken by the heir in possession in reference to improvements of the kind referred to on the mansion-house and offices of the estate, or other parts of it not under lease. The Council approve of the changes proposed to be effected

by the bill, as they consider the personal representatives of an entailed proprietor should be relieved from payment of improvements of a permanent character executed on an entailed estate. By the Entail Amendment Act of 1875, an heir of entail holding under a tailzie dated prior to 1st August 1848 may borrow money to defray the costs of improvements on the estate, and grant bonds therefor; and the present bill makes the provisions in the Act of 1875 (sections 7, 8, 9, 10, and 11) applicable to entailed estates held under tailzies dated on or after 1st August 1848, subject to the provision that sections 7 and 8 of that Act should apply only to improvements executed after the date of the application to the Court in terms of that Act. The bill contains another section (4), whereby it is provided that the 7th, 8th, and 11th sections of the Act 1875, as amended by the bill, shall be applicable to moneys paid by an heir of entail under the provisions of the bill in respect of entailed improvements. The bill was brought into the House of Lords, and after it was read a second time it was referred to a select committee. It was afterwards, with comparatively few alterations, passed, and it is now in the House of Commons. The Council think the bill should pass, but do not deem it necessary to petition in support of it.

"2. *Marriage Preliminaries (Scotland) Bill*, 1878.—According to the preamble of this bill, the object which the promoters have in view is the encouragement of regular marriages in Scotland. It is proposed to attain this object by making it lawful for the clergy of all denominations to celebrate marriages 'either after due proclamation of banns, or after such registration of notice of an intention to marry, as is hereinafter prescribed,' and upon production to the clergyman either (1) 'of a certificate or certificates of due proclamation of banns,' or (2) 'of such registration,' or (3) 'of a license of a Justice of the Peace.' The matter of notice is not unattended with difficulty, but the Council, on the whole, are of opinion that publication by notice to the registrar is as good as anything which has been suggested. The Council are of opinion that it would be more expedient that the Sheriff of the bounds should have power to grant the licenses proposed in the bill, than that such power should be conferred on Justices of the Peace. The only other clause in the bill to which the Council think it necessary to advert is that relating to the 'repeal of existing law as to penalties, and enactment of new penalties.' To make the clause more consistent with the rest of the bill, the Council would recommend that the words 'so far as they require,' in line fifteenth of page five, should be altered into 'requiring,' and that the word 'in' should be substituted for the word 'and,' in the nineteenth line of the same page. The clause would then operate as a repeal of 'all laws, statutes, and usages,' requiring proclamation of banns, 'in so far as they attach any punishment or penalty to the act of contracting or witnessing or celebrating a marriage not preceded by proclamation of banns.'

"3. *Education (Scotland) Bill*.—The Council do not consider it necessary to do more than express approval generally of this measure, as calculated to remedy some of the defects which have been found in the practical working of the original Act. The provisions with reference to higher-class schools, and also the clauses prohibiting young children from being employed in any casual employment, such as vending or exposing for sale articles in the streets or other places, and providing more efficient means for securing the education of children whose parents are neglectful of their duty towards them, are thought important, and likely to lead to beneficial results.

"4. *Breach of Promise of Marriage*.—This bill has one clause, namely, from and after the passing of this Act no person shall be entitled to maintain an action in respect of the breach of a promise to marry. The Council cannot believe that this bill will pass. They can see no good ground for introducing it, but if it should be persevered in the Council recommend the Society to petition against it.

"5. *Criminal Law Practice Amendment Bill, Criminal Law Evidence, Criminal Law Appeals Bills*.—There have been introduced into Parliament three several bills relating to criminal proceedings, apparently applicable to England only.

These bills raise several important points in criminal practice, including the right of a prisoner to give evidence on his own behalf, as well as of a wife to call her husband or a husband a wife as a witness ; but it has not been the practice of the Council to take up bills relating to English procedure, however interesting they may be as regards the general administration of justice. If these bills pass into law, probably in a year or two hence, when their working has been tested in England, certain provisions may be embodied in a bill for Scotland. The Council therefore think no action on the part of this Society in regard to these bills is necessary.

"6. Endowed Schools and Hospitals (Scotland) Bill.—The object of this bill, which has been brought into the House of Lords by the Government, is to enable the governing body of endowed schools and hospitals, and other endowed institutions in Scotland, to apply to Parliament for authority to make changes in the government and management or in the application of their endowments, and that at the same time provision may be made for upholding the standard of education which has hitherto been maintained in Scotland. Although not disclosed on the face of the bill, it is believed to be the object of the Government to throw more completely open endowed schools and hospitals in Scotland, and to provide means whereby their revenues may be made more available for educational purposes. Without entering into an inquiry how far the bill can be made to serve the object aimed at without unduly encroaching on the constitution and working of certain institutions, or whether the commissioners intended to be appointed are the most suitable, the Council approve generally of the scope of the bill, as being calculated to diffuse and extend the benefit of the institutions referred to ; but do not deem it within the province of this Society to interfere with the progress of the measure."

The Lord Clerk-Register (Scotland) Bill.—The following is the full text of the Government bill to make provision in regard to the office of Lord Clerk-Register of Scotland, and for other purposes:—

"Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

"1. Section 26 of the 'Land Registers (Scotland) Act,' 1868, is hereby repealed ; and from and after the passing of this Act, no salary or emoluments shall be attached to the office of Lord Clerk-Register of Scotland.

"2. The Lord Clerk-Register shall continue to be one of the officers of State of Scotland, and shall have the same status and precedence as heretofore ; but, save as herein provided, no rights, authorities, privileges, or duties shall be attached to the office of Lord Clerk-Register.

"3. The Lord Clerk-Register shall, as heretofore, be keeper of the signet, and shall continue to have all the rights, authorities, privileges, and duties belonging to the office of such keeper, including the right of appointing a deputy-keeper and the officers in the Signet Office.

"4. The Lord Clerk-Register shall continue to have all the rights, authorities, privileges, and duties heretofore belonging to or exercised by the Lord Clerk-Register, at or in connection with the election of representative Peers of Scotland.

"5. The right of appointing to the office of Deputy Clerk-Register shall be vested in the Commissioners of her Majesty's Treasury ; and the right of making or nominating to or approving of appointments to any other offices now vested in the Lord Clerk-Register shall be vested in one of her Majesty's Principal Secretaries of State, who shall have power, with the consent of the Commissioners of her Majesty's Treasury, to regulate any of such offices, and, with the like consent, to change the designations thereof, and the terms on which appointments shall be made thereto.

"6. The right of appointing deputies, assistants, clerks, and such other

officers as may be necessary in the General Register of Sasines and the General Register of Hornings, Inhibitions, and Adjudications shall hereafter be vested in the Commissioners of her Majesty's Treasury.

"7. One of her Majesty's Principal Secretaries of State may exercise or discharge any right, authority, or duty, or do any act or thing not herein-before mentioned, heretofore authorized or required to be exercised, discharged, or done by the Lord Clerk-Register; and any reports, acts, or things required to be made or done to or in relation to the Lord Clerk-Register by or under any Act of Parliament, law, or custom, shall, except in so far as otherwise provided by this Act, be made or done to or in relation to such Secretary of State.

"8. Wherever under the present law and practice an order may be made by any court or judge for the production or exhibition by the Lord Clerk-Register of any writ or document in public custody, such order may hereafter be made and enforced against any principal officer having the custody of such writ or document.

"9. All minutes and regulations made in pursuance of this Act shall be laid before Parliament within one month after they are made, if Parliament be then sitting, and if Parliament be not then sitting, within one month after the beginning of the then next session of Parliament.

"10. This Act may be cited for all purposes as the 'Lord Clerk-Register (Scotland) Act,' 1878."

New Form of Commission of a Sheriff-Substitute.—"VICTORIA R.—Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to our trusty and well-beloved CHARLES RAMPINI, Esquire, Advocate, greeting.

"Whereas, by an Act passed in the fortieth and forty-first year of our reign, intituled 'The Sheriff Courts (Scotland) Act, 1877,' it is amongst other things enacted that from and after the passing of the aforesaid Act the right of appointing to the salaried office of Sheriff-Substitute, heretofore belonging to Sheriffs, shall be transferred to, vested in, and exercised by us, our heirs and successors, on the recommendation of one of our Principal Secretaries of State. And whereas the office of Sheriff-Substitute of the shire of Orkney and Zetland is now vacant by the resignation of ANDREW MURE, Esquire: now know ye that we, being well satisfied with the loyalty and abilities of you, the said CHARLES RAMPINI, have nominated, constituted, and appointed, and do by these presents nominate, constitute, and appoint you, the said CHARLES RAMPINI, to be salaried Sheriff-Substitute of the shire of Orkney and Zetland: declaring that you, the said CHARLES RAMPINI, are required generally to reside and attend for the performance of your duties at Lerwick, or at such other place as may be from time to time prescribed by one of our Principal Secretaries of State.

"Given at our court at Saint James's, the thirteenth day of May 1878, in the forty-first year of our reign.

"By Her Majesty's command.

R. ASSHETON CROSS."

This Commission, curiously enough, bears no reference to the Act 33 & 34 Vict. c. 86 passed in 1870. By that Act, which was passed after Mr. Mure's appointment as a Substitute of

Orkney and Zetland by the then Sheriff of Orkney and Zetland, not only was a new combination of the counties of Orkney and Zetland made so as to make a new Sheriffdom of Caithness, Orkney, and Zetland (sec. 3), but it was provided that "every union of counties into one Sheriffdom, under the provisions of this and the recited Act (16 & 17 Vict. c. 92, passed in 1853), or either of them, shall be deemed to be a complete union to all intents and purposes in so far as regards the jurisdiction, powers, and duties of the Sheriff and his Substitutes. . . . And the several counties of any such united Sheriffdom *shall not thereafter be regarded* as separate Sheriffdoms or jurisdictions, but as one Sheriffdom and jurisdiction so far as regards the powers, duties, rights, and privileges of the Sheriff and his Substitute" (sec. 12). Mr. Mure thus undoubtedly became in 1870 a Sheriff-Substitute of the Sheriffdom of Caithness, Orkney, and Zetland, and yet his successor in 1878 is only appointed "Sheriff-Substitute of the shire of Orkney and Zetland." Although the Commission states that it is the fact of the office "now vacant by the resignation of Andrew Mure, Esquire," which has led to the appointment, the appointment has thus not been made *in terminis* to the office which, under the Act of 1870, Mr. Mure had for eight years filled.

While the Commission bears no reference to the Act of 1870, that Act must have been under the notice of the draftsman, because the declaration adjoined as to residence is framed in terms of the 14th section of the Act. This comes of Scotch Commissions being prepared in the Home Office at London.

Appointment of a Tutor-at-law in a Sheriff Court.—On the 24th ult. Sheriff Guthrie of Glasgow was asked to perform the now somewhat unusual duty of appointing a tutor-at-law to a pupil. Evidence of intimation of the brief having been duly proclaimed at the Market Cross was produced, after which a jury of fifteen was empaneled, who heard evidence as to who was the next male agnate, above twenty-five, of the pupil. Having returned their verdict, the Sheriff retoured the brief to Chancery in common form. It is said that a case of the kind has not occurred for fourteen years.

Appointment.—Mr. CHARLES J. G. RAMPINI, Advocate, has been appointed by the Crown to the Sheriff-Substituteship of Orkney and Zetland, at Lerwick, vacant by the resignation of Mr. Andrew Mure, who has resumed his practice at the bar. Mr. Rampini was called to the bar in 1865, and was appointed a District Court Judge in Jamaica in 1867; his health, however, compelled him to leave that country last year. We believe that Mr. Rampini gave general satisfaction in the discharge of his judicial duties in Jamaica, and he brings to his new sphere of work much experience of a very useful and practical kind. As he is the first Sheriff-Substitute appointed under the late Act, we give the terms of his Commission above.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF CAITHNESS.

Sheriffs THOMS and RUSSELL.

THE CAITHNESS ROAD TRUSTEES.

In this case the Road Trustees craved the Sheriff to grant an interdict to prohibit the defender from using a traction engine, so long as the wheels thereof were not cylindrical and smooth-soled, or used with shoes or other bearing surface of a width of not less than nine inches, as required by law. Mr. Lyon insisted that the wheels were conform to the provisions of the "Locomotive Act, 1861," and from the following interlocutor by the Sheriff-Substitute it will be seen that the action was decided in all points in favour of the defender:—

"*Wick, 28th March 1878.*—The Sheriff-Substitute having considered the petition for interdict with defences thereto, closed record, joint minute for parties, writings produced, proof adduced, heard parties' procurators, and advised the cause: Finds that the wheels of the traction engine used by the defender are constructed within the meaning and terms of the third section of the Act 24 & 25 Vict. c. 70, being the last Act for regulating the use of locomotives on turnpike and other roads, and therefore recalls the interim interdict pronounced by him on 11th February last, and finds the pursuers liable to the defender in expenses, allows an account thereof to be lodged, and when lodged remits the same to the auditor of Court to tax and report, and decerns.

HAMILTON RUSSELL.

"*Note.*—The Sheriff-Substitute in this case—a case of no little importance to the pursuers, owners of traction engines, and agricultural interests in general—finds it impossible to get rid of the practical evidence which has been adduced for the defender and not controverted by any similar kind of evidence on the part of the pursuers. To his mind it is perfectly clear, on a fair interpretation of the portions of the Act bearing on the question, together with the evidence before him, that the wheels have been constructed in conformity therewith. He has no doubt whatever as to their being cylindrical—the hinder ones with shoes, and both fore and hind having a bearing surface sufficient to the requirements of the Act, and that consequently the pursuers have no legal claim against the defender for any alleged damage occasioned to the roads, bridges, and cross-drains under their control, or any of them. The particular portions of the section bearing upon the question read as follows:—'That every locomotive drawing any waggon or carriage shall have the tires of the wheels not less than nine inches in width,' and 'the wheels of every locomotive shall be cylindrical and smooth-soled, or used with shoes or other bearing surface of a width of not less than nine inches.' It will be noticed that the 'or' after the word 'soled' makes it alternative or optional. Now what evidence is there that these requirements have been complied with? There is here a traction engine admittedly of ten tons' weight on four wheels—two in front and two behind. The question at issue between the parties is as to the construction of these wheels. The contention of the pursuers is that the wheels of the locomotive or traction engine are not cylindrical or smooth-soled, or used with shoes or other bearing surface of a width not less than nine inches, while that of the defender is principally that they are in conformity with the Locomotive Act of 1861. Have the pursuers substantiated their averments, or has the defender his? The only practical evidence adduced by the pursuers (and this is purely a practical and mechanical case) is that of their road surveyor,

Mr. Harrison—his evidence being to some extent corroborated by that of the witness Munro employed by the petitioners to take the various measurements spoken to by him. It is right to notice, however, that both these witnesses have no mechanical experience whatever (Harrison, p. 5 B, and Munro, p. 16 B). Against this evidence the defender has adduced at least three practical engineers, whose testimony, in the view of the Sheriff-Substitute, considerably outweighs that of the pursuers' witnesses in regard to the mechanical constructions and bearing weight of the wheels of the engine in question, and the Sheriff-Substitute has therefore no option in the matter, and he has found for the defender accordingly.

"The notice of the Sheriff-Substitute was during the course of the debate before him directed to a case, said to be parallel with the present one, decided in the Exchequer Division, 16th January 1877, *Stringer v. Sykes*, in which it was held that the bearing surface not being continuous, the engine was not in conformity with the Act. But with the contentions in that case—in which the individual opinions of the judges appear to be different, although the decision of Chief-Baron Kelly was acquiesced in by Baron Cleasby—the Sheriff-Substitute has nothing to do, as he holds, irrespective of a known principle in mechanics, that it has been satisfactorily proved from the evidence adduced in the present case that the wheels with shoes, such as those in question, must and *de facto* have a bearing surface, be it continuous or otherwise, in conformity with the Act.

"In regard to the question of damage alleged to have been occasioned to a certain bridge or bridges, and a cross-drain or drains under the control of the pursuers, a question of great importance arises, and that is, Are the roads, bridges, and cross-drains in such a sufficient state of repair as to sustain or bear the weight of traction engines, allowed by Act of Parliament, and of authorized and known weight, travelling over them? The Sheriff-Substitute is of opinion that the defender might have brought testimony as to when such bridges and drains were last repaired, and generally as to their stability; but as he has decided the case *ut supra* he only deems it necessary to draw the attention of the pursuers to the matter, in order that they may have defects such as indicated, if any there be, remedied. H. R."

The case was appealed to the Sheriff, who has issued the following interlocutor:—

"*Wick, 9th April 1878.*—The Sheriff having heard parties' procurators, and considered the pursuers' appeal and whole process, sustains the said appeal and recalls the interlocutor submitted to review: Finds (1) that the locomotive engine complained of has front wheels with a sole of twelve inches in breadth, and a ring in the centre of the sole six inches wide, which ring projects half an inch from the rest of the sole; (2) that this ring is not a shoe; (3) that the front wheels of this engine have not any other bearing surface of a width of nine inches; (4) that the front wheels of this engine are not smooth-soled; (5) that the front wheels of this engine are not in conformity with the provisions of section 3rd of the Act 24 & 25 Vict. c. 70 (Locomotive Act, 1861), which require that 'the wheels of every locomotive shall be cylindrical and smooth-soled, or used with shoes or other bearing surface, of a width not less than nine inches,' and are prohibited by the Act to be used on any locomotive engine on any turnpike or other road within the meaning of the Act; and (6) that the roads mentioned in the prayer of the petition are turnpike or other roads within the meaning of said Act: Therefore, grants interdict against the respondent in terms of the prayer of the petition, and decerns with expenses, including those of the appeal, in favour of the pursuers, as the same may be taxed. GEO. H. THOMS.

"*Note.*—The Sheriff was very much impressed by the argument in support of the defender and respondent's third plea as now amended. The respondent argued that this petition, as an application for interdict, and not to recover

penalties for breach of the third section of the Act 24 & 25 Vict. c. 70 (Locomotive Act, 1861), was incompetent. He maintained that there is a distinction drawn in the Act between breaches of it which only infer pecuniary penalties (sections 3, 8, 11, and 12), and illegal Acts to which no penalties are attached, and which, being illegal, may be stopped by interdict (sections 4, 6, and 9). This derived confirmation from sections 7 and 13, whereby actions at law are declared competent in certain specified cases. The case in the Exchequer Court, quoted by the pursuers, *Stringer v. Sykes*, 16th January 1877, II. Law Reports (appeal cases) 240, it was maintained, strengthened this argument as to the incompetency of resort to interdict, because it was only a prosecution for penalties for breach of section 3. The remedy other than a suit for the penalties was provided by section 5, which gives power to the Secretary of State to prohibit the use of locomotives destructive to highways, the case alleged here. Section 5 does not, in the Sheriff's opinion, oust the Sheriff's jurisdiction, if the breach of section 3 by the respondent is otherwise illegal and open to interdict.

"To ascertain whether this breach is so illegal as to be open to interdict, depends on an examination of the whole Act. Although it does not use the words 'it shall not be lawful' as regards all the Acts it prohibits, it shows by some of its sections that Acts prohibited under penalties are equally unlawful as Acts to which no penalty is attached. Thus sections 9 and 11 not only say that the Acts which they prohibit 'shall not be lawful,' but attach penalties to any offence against its provisions. Section 11 enacts that a locomotive shall not be driven along a public road at a greater speed than ten miles an hour, nor through a town or village at a greater speed than five miles an hour. In the public interests it would be to be regretted if interdict were not available to stop this illegality as well as public danger in the future, as well as an action to recover a penalty to punish the offence in the past.

"Further, as the penalties under the Act are generally recoverable only before the Justices of Peace, it would require special provisions to deny to the Sheriff power to prevent what the Legislature has out and out prohibited. A rich offender might also be prepared to pay repeated penalties, and would thus be privileged to continue the prohibited offences if interdict by the Sheriff were not available. The defender's construction of the Act would also seem to involve immunity from claims for damages occasioned by the engine, and recoverable at common law. These considerations influence the Sheriff in repelling the plea to the competency of the present application.

"The Sheriff agrees with the Sheriff-Substitute, that the *back* or *hind* wheels of the locomotive complained of are not in breach of section 3 of the statute. The case of *Stringer v. Sykes* against this view is nothing but a decision of Justices of the Peace; for the two judges of appeal, Barons Kelly and Cleasby, differed, and hence their decision was affirmed. The Sheriff is of opinion with the Sheriff-Substitute, that Baron Cleasby, who was for reversing the Justices' decision, had the stronger position. The use of soles in the Act, as opposed to a smooth-soled wheel, or a wheel with another kind of bearing surface, would otherwise be unintelligible.

"But the Sheriff differs from the Sheriff-Substitute as to the *front* wheels of this locomotive engine. The projecting ring, six inches wide, in the centre of the twelve-inch sole which projects half an inch, is not a shoe, and is inconsistent with the provision that where there are no shoes the wheel is to be smooth-soled, or is otherwise to have a bearing surface of nine inches. On this ground, the Sheriff has reversed the interlocutor appealed against, with expenses."

SHERIFF COURT OF BANFFSHIRE.

Sheriffs BELL and SCOTT MONCRIEFF.

MUNRO PETITIONER.

Cessio bonorum—*Proper form of petition*—*Act of Sederunt, 6th June 1839*—*Sheriff Court Act, 1876*.—This was an application for the benefit of *cessio bonorum*, in which the Sheriff-Substitute (Scott Moncrieff) granted interim protection. The following note accompanied his interlocutor:—

"It was objected by the agent for the opposing creditor that this petition for *cessio* is not in the form prescribed by the Act of Sederunt relative to the Act of King William IV. The Sheriff-Substitute, without expressing any opinion as to the competency of still using that form, is of opinion that the present one is unobjectionable. It is as nearly as may be that provided by the Act of 1876 for actions in the Sheriff Court, and *cessios* can now only be obtained by raising an action in the Sheriff Court."

The opposing creditor appealed to the Sheriff (Bell), who, on 13th April 1878, pronounced the following interlocutor:—

"The Sheriff recalls the interlocutor appealed against: Allows the petitioner Munro to amend his petition so as to make it correspond with the Act of Sederunt 6th June 1839, and in order thereto to lodge within four days a minute of amendment, and continues the protection until recalled by an order of Court.

BEN. R. BELL.

"*Note*.—When there is an Act of Parliament declaring the order of procedure, not merely the easiest, but also the safest course, is to follow the directions of the Legislature. There is a frequent propensity to imagine that something wiser than the Parliamentary enactment has been discovered; and it cannot be pronounced to be necessarily impossible that the new discovery may display more wisdom and expediency than the Legislature. But then, unfortunately, it has not the same authority. And this is especially to be attended to when the proceeding in question is one which is only, and as a novelty, rendered competent by the statute which dictates the forms. Jurisdiction in the process of *cessio bonorum* was first conferred upon the Sheriff Court by the Act 6 & 7 Will. IV. c. 56. But by section first it is expressly enacted that the Sheriff shall only 'possess jurisdiction in actions of *cessio bonorum* brought before him in manner hereinafter provided.' Acting under this statute, the Lords of Session passed the Act of Sederunt, 6th June 1839, in order, as it states, 'to regulate the procedure in processes of *cessio bonorum* in Sheriff Courts, so as to render the same as nearly uniform as possible in all the Sheriff Courts.' And with this view the Lords, *inter alia*, enacted that the process shall commence by a petition drawn in a certain form, which they set forth at full in Schedule A. Section first expressly declares that 'all petitions for the benefit of *cessio bonorum* presented to the Sheriff shall be framed in terms of 6 & 7 Will. IV. c. 56, sec. 3, and shall be in the form of Schedule A hereto annexed.' Now this form cannot be departed from unless it has been abolished by the Sheriff Court Act of 1876; but that can only be if the whole branch of the Act Will. IV. applicable to the Sheriff Court and the Act of Sederunt 6th June 1839 have been abolished. The Act of 1876 contains no special abolition of the form of process enacted by those Acts. It cannot, therefore, supersede the form of process unless it has set aside the whole of these Acts *in toto*. But that it has not done. It has expressly done the reverse, for it provides, sec. 26 (2), that the petitioner 'shall be entitled to raise an action in the Sheriff Court praying for interim protection and for decree of *cessio bonorum* under the Act of the 6th and 7th years of the reign of King William IV., chapter 56, as amended by this Act.' There follow no doubt various amendments in subsections 3, 4, 5, of sec. 26. But not one of these touches the form of the petition; and the specifications particularly of these amendments show all the more that when there is no amendment or alterations specified the former rules stand.

"In particular, there was a peculiar and now inconvenient rule about the form of reclaiming against certain interlocutors, and this is altered by subsection (4). But this just makes it more certain that the form of process under the Act of William IV. and Act of Sederunt of 1839 are not generally abolished, otherwise it would have been absurd to abolish *separatim*, the rule regulating appeals, which, upon the supposition of a general overturn, must have disappeared along with the rest. It is indeed contended that the form of petition in sec. 6 of the Act of 1876 is extended to actions of *cessio bonorum*. But if so, then the form of warrant contained in the same section must of necessity equally apply, and it is plainly impossible that this could have been intended. Indeed it is impossible to stop short even after the warrant. If the Act of 1876 prescribes a form of petition and of the warrant to be written on it, then it equally extends to this very peculiar description of action, many other things to be observed which are essentially incompatible with the objects and nature of such an action; and the incompatibility is radical and fundamental. The process of *cessio bonorum* is not like any ordinary action levelled against a definite defender; it is like a process of multiplepinding directed against all comers. And the consequence is, that it cannot by any possibility be conducted and carried out to a conclusion in the manner prescribed for ordinary actions by the Act of 1876. If the action must commence under the forms of 1876, and cannot be conducted under those forms to a termination, at what point is the Act of 1876 to be thrown overboard, and the Act of William IV. returned to? It is perfectly plain that there is no point anywhere at which this act of tergiversation can be perpetrated unless this is done in the middle of sec. 6. The latter part of the Sheriff Court Act of 1876, section 6, cannot by any possibility be intended to work along with sections 4, 5, 6, and others of the Act of William IV. And it is impossible to attach one interpretation to the beginning of a section, and to give an opposite meaning to the second part of the same section.

"Supposing the present stage got over, how are sections 16 and 18 of the Act of 1876 to be complied with in any way compatible with the purpose and nature of the actions?"

"Nay, how has this very first step of all been accomplished? Has not the petitioner stumbled on the very threshold? The very form which the petitioner undertakes to follow runs in the statute thus: A. B. (design him), pursuer against C. D. (design him), defender. What has the petitioner made of this C. D. (design him), defender? He will say that he omitted this because there is no defender. Well, that just shows that the process of *cessio bonorum* is one to which the form in Schedule A of the Sheriff Court Act of 1876 does not and cannot apply. This, like some other matters already noticed, is no mere technical puzzle; it enters into the very nature of such a process. If it had been intended to set aside the forms in use for a process of *cessio bonorum*, it would have been indispensable to provide some rules applicable to such a process as has been done with regard to the action of multiplepinding.

"In short, it is impossible to substitute the form of petitions in ordinary actions under the Act of 1876 for the form in the Act of Sederunt of 6th June 1839, under the Act of William IV., without sweeping away the whole provision of both those Acts with regard to the calling of creditors, the insolvents' attendance for examination, the summary discussion, and other relative matters which evidently neither was nor possibly could be intended.

"The amendment now allowed is certainly violent. But a case affecting personal liberty may admit of some stretching of ordinary rules. B. L. B."

Act.—Colville.—Alt.—George.

SHERIFF COURT OF ZETLAND.

Sheriff THOMAS.

RUSSELL v. WALKER AND OTHERS.

This was an action for £103, 8s. 10d. brought by a builder for work done in erection of a house and other premises at Scalloway, on land to which the

only title was a lease which came, at the Whitsunday preceding the commencement of the pursuer's work, to be held by the three defenders, one of whom was bankrupt. The two solvent defenders stated a defence on the ground that they were not in reality lessees along with the bankrupt defender, but merely held two-thirds of the lease as a security for advances to the other defender. The Sheriff-Substitute (Mr. Mure) pronounced this interlocutor and note:—

"*Lerwick, 23rd March 1878.*—The Sheriff-Substitute having heard parties, and considered the closed record, proof, and productions, Finds in point of fact—(1) That under the lease and assignation thereof, No. 8 of process, the defenders, John Walker and William Stevenson Smith, were vested with a joint right equally with the assignor, Robert Scott, share and share alike, in the piece of ground and subjects described in said lease, and that that joint interest was acquired by the said defenders and assignor as from Whitsunday 1876; (2) that about and after the said date of Whitsunday 1876 the pursuer executed the work and supplied the material stated in the account, No. 5 of process, on a house and stores being erected on the said piece of ground in said lease; (3) that the pursuer was instructed by the said Robert Scott, one of the joint lessees, to execute the said work and supply the said material, the said Robert Scott being *propositus negotiis* in the matter; (4) that both the defenders Walker and Smith knew of the building being proceeded with on the ground of the said lease, and have each retained his third *pro indiviso* share of the lease as his absolute property, and have taken benefit from the work done and materials supplied by the pursuer; (5) that the said defenders have not dealt with the said lease as a security, though Robert Scott, the other joint lessee, was sequestrated while the building was being erected: Finds, in point of law, that the defenders are jointly and severally liable to the pursuer in payment of the said account: Therefore the Sheriff-Substitute decerns the defenders, John Walker and William Stevenson Smith, and Alexander Mitchell, as trustees on the sequestrated estate of the said Robert Scott, but the said Alexander Mitchell only to the effect of a constitution of the debt and ranking of the same on the said sequestrated estate, conjunctly and severally to pay to the pursuer the sum of £103, 8s. 10d. sterling, being the amount of the said account, but under deduction of the sum of £1, 6s. 5d. sterling, the value of wood supplied by the defenders to the pursuer, and used by the latter in the course of the said work: Finds the defenders, John Walker and William Stevenson Smith, liable in expenses: Allows an account thereof to be lodged in process, and remits the same to the auditor to tax and report. ANDREW MURE.

"*Note.*—The defence to the present action is that the assignation of the lease in question was taken as a security for advances by the assignees Walker and Smith, and so both of these gentlemen distinctly depone to that effect. But the legal result of the case must depend upon the real nature in law of the transaction, and not upon the mere intention of the parties, or the statement of that intention now made. Light is thrown upon the nature of the assignation by the subsequent effort, when the advances to be made by the defenders to Scott increased in amount, to procure from Scott an assignation of his third, together with the execution of a back bond. The want of the back bond, qualifying the first assignation, is significative of the real nature of the transaction, and leaves the matter in the position of an absolute right. The parties in law must be held to be in the position of joint lessees; and without analyzing the evidence, or contrasting the two sides which it presents, the presumption of fact is that a joint adventure would result from the right of joint lease which the parties had acquired.

"Whether the matter be looked upon as a joint lease or a joint adventure, the liability of the defenders seems undoubted. Hunter, in his law of 'Landlord and Tenant,' vol. i. p. 201, says, 'A joint lease creates a *pro indiviso* liability in each of the lessees. Each is liable *in solidum* for the rent, and for performance of the other prestations, even by possession in consequence of tacit relocation after the expiration of the lease. Nor does the non-occupation

and absence of one exempt him from liability for the non-observance of the prestations while the subject was occupied by the other.' The case of *Sutherland v. Robertson* (1736), M. 13,979, referred to by Mr. Hunter, is instructive. There a mansion-house was let to a lady and her son-in-law: the lady occupied the house, the son-in-law lived a good many miles off: the house was burned down by the lady's fault, and the son-in-law was held conjunctly and severally liable with her therefor. The principle applies to the present case. Having taken a joint assignation of a lease, and knowing that a building was being erected on the piece of ground contained in the lease, the defenders, who have retained their right, and who are *lucrati* by the work done and materials supplied by the pursuer, in common sense and law are bound to remunerate him, and keep him free from their co-lessee's failure to pay him.

"If, again, the matter be looked at in the light of a joint adventure, and the understanding of Mr. Mitchell, who was discounting the bills of the parties, is perhaps the most reliable test of the transaction, and points entirely in that direction, then the responsibility of the defenders is equally clear. In joint adventure 'the parties are responsible *singuli in solidum*, each being bound as by mandate, express or presumed, for the engagements of the active partners.' (See MacLaren's 'Bell's Commentaries,' vol. ii. p. 359.) By the very nature of the transaction a latent or absent partner is liable as much as the known and ostensible partner. He who is intrusted with the management binds all interested in the matter, and makes them responsible to third parties.

"No doubt this is a hard case for the defenders; but, as has been said, hard cases make good law. A. M."

The defenders Smith and Walker appealed, and the following is the interlocutor and note of the Sheriff (Mr. Thoms):—

"The Sheriff having resumed consideration of the appeal of the defenders Smith and Walker, with reclaiming petition for them, and considered the whole process: Sustains said appeal to the effect of cancelling the evidence of Andrew Smith and Magnus Manson in the pursuers' conjunct probation, and deletes the same accordingly: *Quoad ultra*, dismisses said appeal and adheres to the interlocutor submitted to review: Finds neither party liable in expenses since 23rd March 1878, and decerns. GEO. H. THOMS.

"*Note.*—The Sheriff, to the considerations mentioned by the Sheriff-Substitute in his note, would add a reference to the defenders' conduct in the other defender Scott's sequestration. They did not in the sequestration take up the position which they now take up in their defences to this action. Had they done so they would have claimed, as creditors for their alleged advances, and valued in their affidavits, their alleged security.

"The appellants were right in objecting to the evidence of Andrew Smith and Magnus Manson in the pursuer's conjunct probation, as it was not conjunct in any way to the defender's proof. They were brought to speak to statements by the defender Smith as to which he had never one question put to him, and this was incompetent alike in conjunct probation and proof in chief (*Gall v. Gall*, 23rd Nov. 1870, 9. Macp. 177). The defenders have asked in their reclaiming petition to cancel this incompetent evidence and to that extent its prayer has been granted. The Sheriff has very frequently had to call attention to the incompetency of such evidence. G. H. T."

SHERIFF COURT OF ORKNEY.

Sheriff THOMS.

TULLOCH'S EXECUTOR *v.* MARWICK, *et c. contra.*

Sheriff Court Act of 1876, sec. 23—Sheriff has no power to allow more than seven days between proof and debate, however intricate the case—Procedure where a pseudo

reclaiming petition lodged in place of a written argument.—These are combined actions of accounting relating to mercantile transactions extending over a period of six years. After a long proof as to nearly all the items, the Sheriff-Substitute (Mellie) pronounced an interlocutor dealing with the details, and making findings as to each of the disputed items on 13th February 1878. He had, on the motion of both parties, adjourned the debate for seven days after closing the proof, adding in a note to the interlocutor doing this, that on account of "the intricacy of the details" he was disposed to adjourn, as they had moved, for fourteen days. "He considers, however, that sec. 23 of the Sheriff Court Act, 1876, unfortunately leaves to the Sheriff-Substitute no discretion, but to allow one adjournment of debate for a period not exceeding seven days." The debate lasted for two days.

The case was appealed by Marwick to the Sheriff (Thoms), and he ordered a reclaiming petition within ten days of the Sheriff-Clerk's, dating the interlocutor under sec. 50 of the said Act, and answers within ten days of the lodging of the reclaiming petition. Papers bearing these titles were lodged accordingly, and the Sheriff thereupon pronounced the following interlocutor :—

"The Sheriff having resumed consideration of this appeal, together with the papers called reclaiming petition and answers which have been lodged: Finds that the paper called a reclaiming petition is not a reclaiming petition, inasmuch as it contains no arguments in support of the appeal: And of new appoints a reclaiming petition containing the arguments which the appellant has to submit in support of his appeal, and dealing successively with the items to which the findings in the Sheriff-Substitute's judgment relate, and the details set forth in the note appended to that judgment, and setting forth the proof that bears on each item to be lodged within twenty-one days from the date of this interlocutor: Reserving any order for new answers until it is seen whether a reclaiming petition is lodged, which implements this order and requires to be answered: And finds the appellant liable to Tulloch's executor in expenses since the date of appeal, 19th February 1878, including the answers to the so-called reclaiming petition, as the same may be taxed. GEO. A. THOMS.

KIRK WALL, 1st April 1878.

"*Note.*—The appellant did not minute his desire to have the appeal disposed of without written or oral pleading, as he might have done. Accordingly written pleadings were ordered within what has not been stated, and can scarcely be considered, to have been an insufficient period, seeing that the two days' exhaustive debate before the Sheriff-Substitute was so recent. This order has not been implemented by the appellant, who has lodged merely a copy of the Sheriff-Substitute's interlocutor and note, extending to thirty-four pages (in violation of section 30 of the Act of 1876), and a criticism of the system of bookkeeping of, and the hues of the ink used by, the late Mr. Tulloch, extending to nineteen pages, without any attempt to deal with the detailed items and the bearing of the evidence on them. The apology for such conduct occupies the preamble of this so-called reclaiming petition, and is as follows :—'The claimer respectfully refrains from following in detail the line of argument pervading the note to the Sheriff-Substitute's interlocutor of 13th February last, but which he considers to be wholly untenable.' The Sheriff is unwilling to believe that disrespect to the Court was intended by the appellant in thus withholding from the Sheriff that assistance to which, in a case of such intricate details, and where the interlocutor of the Sheriff-Substitute had dealt with these exhaustively, he was entitled, and which the appellant by the course he took led the Sheriff to believe that he was willing to afford. Accordingly he has not dealt with the appellant or his agent on that footing.

"The Sheriff might have held that the appellant's failure to obtemper the order for written arguments entitled him to have dismissed the appeal by default. But he prefers to adopt the course he has taken by the above interlocutor, and if the provincial bar is not equal to the occasion the vacation of the Court of Session will enable the services of counsel to be obtained.

Accordingly time has been allowed for the preparation of the most thorough argument, and more may be given if timeously applied for on good cause shown. The delay thus rendered necessary is regretted by the Sheriff, but he has given Tulloch's executor the whole of the expenses incurred by him during the period which the appellant has not utilized as he ought.

G. H. T."

Notes of English, American, and Colonial Cases.

TRIAL OF EXTRADITED CRIMINALS FOR OFFENCES NOT NAMED IN TREATY.

KENTUCKY COURT OF APPEALS, APRIL 17, 1878.

COMMONWEALTH v. HAWES.

The right of one government to demand and receive from another the custody of an offender who has sought asylum upon its soil, depends upon the existence of treaty stipulations between them, and in all cases is derived from, and is measured and restricted by the provisions, express and implied, of the treaty. A fugitive from justice was, under the provisions of the extradition treaty of 1842, between this country and Great Britain, surrendered by the Canadian authorities to be tried in Kentucky upon an indictment for forgery. Held, that he could not, while in the custody of the Court, under such surrender, be tried upon an indictment for embezzlement.—Appeal by the Commonwealth from an order of the Kenton Criminal Court, directing that the defendant, Smith N. Hawes, indicted for embezzlement, be not held in custody, and that the case against him be not placed on the docket. The facts appear in the opinion.

T. E. Moss and W. W. Cleary, for appellant.

J. G. Carlisle and J. W. Stevenson, for appellee.

LINDSAY, C. J. Smith N. Hawes stood indicted in the Kenton Criminal Court for uttering forged paper for embezzlement, and also upon four separate and distinct charges of forgery. He was found to be a resident of the town of London, in the dominion of Canada, and in February 1877 was demanded by the President of the United States, and surrendered by the Canadian authorities to answer three of said charges of forgery.

As to the fourth charge, the evidence of his criminality was not deemed sufficient, and that alleged offence was omitted from the warrant of extradition.

The demand and surrender were made in virtue of and pursuant to the tenth article of the treaty concluded August 9, 1842, between the kingdom of Great Britain and the United States of America.

The attorney for the Commonwealth caused two of the indictments for forgery to be dismissed. Hawes was regularly tried under each of the remaining two, and in each case a judgment of acquittal was rendered in his favour upon a verdict of not guilty.

After all this, however, the officers of Kenton county continued to hold him in custody, and finally, on motion of the attorney for the Commonwealth, one of the indictments for embezzlement was set down to be tried on the 6th day of July 1877. Further action was postponed from time to time until the 21st of August 1877, when Hawes presented his affidavit, setting out all the facts attending his surrender, and the purposes for which it was made, and moved the Court to continue all the indictments then pending against him, and to surrender him to the authorities of the United States, to be by them returned or permitted to return to his domicile and asylum in the dominion of Canada. This motion was subsequently modified to the extent that the Court was asked

to set aside the returns of the Sheriff on the various bench warrants under which he had been arrested, and to release him from custody.

The Court, in effect, sustained this modified motion, and ordered "that the cases of the *Commonwealth of Kentucky v. Smith N. Hawes*, for embezzlement, and for uttering forged instruments with intent, etc., be continued, and be not again placed on the docket for trial, and that said Hawes be not held in custody until the further order of this Court."

From said order the Commonwealth has prosecuted this appeal. It is not final in its nature, but under the provisions of sections 335 and 337 of the Criminal Code of Practice, it may nevertheless be reviewed by this Court.

It was the opinion of the learned judge (Jackson) who presided in the Court below, that the tenth article of the treaty of 1842 impliedly prohibited the government of the United States and the Commonwealth of Kentucky from proceeding to try Hawes for any other offence than one of those for which he had been extradited, without first affording him an opportunity to return to Canada, and that he could not be lawfully held in custody to answer a charge for which he could not be put upon trial.

The correctness of this opinion depends on the true construction of the tenth article of the treaty, and also on the solution of the question as to how far the judicial tribunals of the Federal and State governments are required to take cognizance of, and in proper cases to give effect to, treaty stipulations between our own and foreign governments.

Section 2, article 6, of the Federal Constitution, declares that: "This Constitution, and the laws of the United States, made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges of every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

It will thus be seen that with us a public treaty is not merely a compact or bargain to be carried out by the executive and legislative departments of the general government, but a living law, operating upon and binding the judicial tribunals, State and Federal, and these tribunals are under the same obligation to notice and give it effect, as they are to notice and enforce the Constitution, and the laws of Congress made in pursuance thereof.

"A treaty is in its nature a compact between two nations, not a legislative act. It does not generally effect of itself the object to be accomplished, especially so far as its object is infra-territorial, but is carried into execution by the sovereign powers of the respective parties to the instrument. In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is consequently to be regarded in the courts of justice as equivalent to an act of the Legislature whenever it operates of itself, without the aid of any legislative provision." (*Foster v. Neilson*, 2 Peters, 253, per Chief Justice Marshall.)

When it is provided, by treaty, that certain acts shall not be done, or that certain limitations or restrictions shall not be disregarded or exceeded by the contracting parties, the compact does not need to be supplemented by legislative or executive action, to authorize the courts of justice to decline to override these limitations, or to exceed the prescribed restrictions, for the palpable and all-sufficient reason, that to do so would be not only to violate the public faith, but to transgress the "supreme law of the land."

A different rule seems to have been intimated in the case of *Caldwell* (8 Blackford, C. C. Reports, 131), but the real decision rendered in that, as in the subsequent case of *Lawrence* (13 Blackford, C. C. Reports, 295), decided by the same judge, was, that extradition proceedings had pursuant to the treaty under consideration, do not by their nature secure to the person surrendered, immunity from prosecution for offences other than the one upon which the surrender is made, and the intimation in *Caldwell's* case, that the judiciary may leave it to the executive department to interfere to preserve and protect

the good faith of the government in a case like this, is at the most but a *dictum*. The tenth article of the treaty of 1842 is as follows :—

"It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions by them, or their ministers, officers, or authorities, respectively made, deliver up to justice all persons, who, being charged with the crime of murder or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found within the territories of the other: *Provided*, that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed; and the respective judges and other magistrates of the two governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive."

It will be seen that the trial and punishment of the surrendered fugitive for crimes other than those mentioned in the treaty is not prohibited in terms, and that fact is regarded as of controlling importance by those who hold to the view that Hawes was not entitled to the immunity awarded him by the Court below. But if the prohibition can be fairly implied from the language and general scope of the treaty, considered in connection with the purposes the contracting parties had in view, and the nature of the subject about which they were treating, it is entitled to like respect, and will be as sacredly observed as though it was expressed in clear and unambiguous terms.

Public treaties are to be fairly interpreted, and the intention of the contracting parties to be ascertained by the application of the same rules of construction, and the same course of reasoning which we apply to the interpretation of private contracts.

By the enumeration of seven well-defined crimes for which extradition may be had, the parties plainly excluded the idea that demand might be made as matter of right for the surrender of a fugitive charged with an offence not named in the enumeration, no matter how revolting or wicked it may be.

By providing the terms and conditions upon which a warrant for the arrest of the alleged fugitive may be issued, and confining the duty of making the surrender to cases in which the evidence of criminality is sufficient, according to the laws of the place where such fugitive is found, to justify his commitment for trial, the right of the demanding government to decide finally as to the propriety of the demand, and as to the evidences of guilt, is as plainly excluded as if that right had been denied by express language.

It would scarcely be regarded an abuse of the rules of construction, from these manifest restrictions, unaided by extraneous considerations, to deduce the conclusion that it was not contemplated by the contracting parties that an extradited prisoner should, under any circumstances, be compelled to defend himself against a charge other than the one upon which he is surrendered, much less against one for which his extradition could not be demanded.

The consequences to which the opposite view may lead, though by no means conclusive against it, are nevertheless to receive due and proper weight.

It would present a remarkable state of case to have one Government saying in substance to the other: "You cannot demand the surrender of a person charged with embezzlement. My judges or other magistrates have no right or authority, upon such a demand, either to apprehend the person so accused, or to inquire into the evidences of his criminality; and if they should assume to do so, and should find the evidence sufficient to sustain the charge, the proper executive authority could not lawfully issue the warrant for his surrender."

But you may obviate this defect in the treaty by resting your demand upon the charge of forgery, and if you can make out a *prima facie* case against the fugitive, you may take him into custody, and then, without a breach of faith, and without violating either the letter or spirit of our treaty, compel him to go to trial upon the indictment for the non-extraditable offence of embezzlement."

And if this indirect mode of securing the surrender of persons guilty of other than extraditable offences may be resorted to, or if the demand, when made in the utmost good faith, to secure the custody of a criminal within the provisions of the treaty, can be made available to bring him to justice for an offence for which he would not have been surrendered, then we do not very well see how either government could complain if a lawfully extradited fugitive should be tried and convicted of a political offence. Prosecutions for the crime of treason are no more provided against by the treaty than prosecutions for the crime of embezzlement, or the offence of bribing a public officer.

Mr. Fish, in his letter of May 22, 1876, to Mr. Hoffman, in reference to the extradition of Winslow, attempts to meet this difficulty by saying that "neither the extradition clause in the treaty of 1794, nor in that of 1842, contains any reference to immunity for political offences, or to the protection of asylum for religious refugees. The public sentiment of both countries made it unnecessary. Between the United States and Great Britain it was not supposed on either side that guarantees were required of each other against a thing inherently impossible, any more than by the laws of Solon was a punishment deemed necessary against the crime of parricide, which was beyond the possibility of contemplation."

But President Tyler, under whose administration the treaty of 1842 was concluded, evidently thought that the guarantees of immunity to political refugees were to be implied from the treaty itself, and not left to rest alone on the public sentiment of the two countries. In communicating the draft of the treaty to the Senate for its ratification, speaking of the subject of extradition, he said :—

"The article on the subject, in the proposed treaty, is carefully confined to such offences as all mankind agree to regard as heinous and destructive of the security of life and property. In this careful and specific enumeration of crimes, the object has been to exclude all political offences, or criminal charges arising from wars or intestine commotions. Treason, misprision of treason, libels, desertion from military service, and other offences of similar character, are excluded."

This interpretation was cotemporaneous with the treaty itself, and deserves the higher consideration, from the fact that it was contained in a paper prepared by the then Secretary of State, Mr. Webster, who represented the Government of the United States in the negotiations from which it resulted.

It seems, also, that the extradition article of the treaty was understood in the same way by the British Parliament in 1843. The Act of Parliament of that year, passed for the purpose of carrying it into effect, directed that such persons as should thereafter be extradited to the United States should be delivered "to such person or persons as shall be authorized, in the name of the United States, to receive the person so committed, and to convey him to the United States, to be tried for the crime of which such person shall be accused."

The precise purpose for which the fugitive is to be surrendered is set out in exact and apt language, and the act negatives, by necessary implication, the right here claimed, that the person surrendered may be tried for an offence different from that for which he was extradited, and one for which his surrender could not have been demanded.

The American Executive in 1842, and the British Parliament in 1843, seem to have been impressed with the conviction that the treaty secured to persons surrendered under its provisions an immunity from trial for political offences far more stable and effectual than the public sentiment of the two countries. Experience had taught them that in times of intestine strife and civil commotions, the most enlightened public sentiment may become warped and per-

verted, just as it has taught that man is sometimes capable of committing the unnatural crime of parricide, although such a crime seemed impossible to the great Athenian lawgiver.

And this view was adhered to by Congress in 1848, when the general law providing for the surrender of persons charged with crime to the various governments with which we had treaty stipulations on that subject, was passed. After setting out the necessary preliminary steps, it was provided by the third section of that Act, "That it shall be lawful for the Secretary of State, under his hand and seal of office, to order the person so committed to be delivered to such person or persons as shall be authorized, in the name and on behalf of such foreign government, to be tried for the crime of which such person shall be accused."

This, like the Act of Parliament, declares the purpose of the surrender to be that the alleged offender may "*be tried for the crime of which such person shall be accused.*"

The maxim, *expressio unius est exclusio alterius*, may with propriety be applied to each of these Acts; and read in the light of that maxim, they are persuasive at least of the construction which, up to 1848, the two contracting parties had placed on the tenth article of the treaty.

The Act of Congress is, in one view, more important than the British Act of 1843. It does not rest alone on the proper interpretation of a particular treaty, and may be regarded as a legislative declaration of the American idea of the fundamental or underlying principles of the international practice of extradition.

The ancient doctrine that a sovereign State is bound by the law of nations to deliver up persons charged with, or convicted of, crimes committed in another country, upon the demand of the State whose laws they have violated, never did permanently obtain in the United States. It was supported by jurists of distinction like Kent and Story; but the doctrine has long prevailed with us that a foreign government has no right to demand the surrender of a violator of its laws unless we are under obligations to make the surrender, in obedience to the stipulations of an existing treaty. (Lawrence's *Wheaton's International Law*, p. 233, and authorities cited.)

As said by Mr. Cushing, in the matter of Hamilton, a fugitive from the justice of the State of Indiana, "It is the established rule of the United States neither to grant nor to ask for extradition of criminals as between us and any foreign government, unless in cases for which stipulation is made by express convention." (*Opinions of Attorney-Generals*, vol. vi. p. 431.)

From the treatise of Mr. Clark on the subject of extradition, we feel authorized to infer that this is the English theory; but whether it is or not, that government certainly would not, in the absence of treaty stipulations, surrender fugitives to a government which, like ours, would refuse to reciprocate its acts of comity in that respect.

The right of one government to demand and receive from another the custody of an offender who has sought asylum upon its soil, depends upon the existence of treaty stipulations between them, and in all cases is derived from, and is measured and restricted by, the provisions, express and implied, of the treaty. The fugitive Hawes, by becoming an inhabitant of the Dominion of Canada, placed himself under the protection of British laws, and we could demand his surrender only in virtue of our treaty with that government, and we held him in custody for the purposes contemplated by that treaty, and for no other.

He was surrendered to the authorities of Kentucky to be tried upon three several indictments for forgery. The Canadian authorities were of opinion that the evidences of his criminality were sufficient to justify his commitment for trial on said three charges. One of the charges the Commonwealth voluntarily abandoned. He was tried upon the remaining two, and found not guilty in each case by the jury, and now stands acquitted of the crimes for which he was extradited.

It is true he was in Court, and in the actual custody of the officers of the law when it was demanded that he should be compelled to plead to the indictment for embezzlement. But the specific purposes for which the protection of the British laws had been withdrawn from him had been fully accomplished, and he claimed that, in view of that fact, the period of his extradition had been determined; that his further detention was not only unauthorized, but in violation of the stipulations of the treaty under which he was surrendered, and that the Commonwealth could not take advantage of the custody in which he was then wrongfully held, to try and punish him for a non-extraditable offence.

To all this, it was answered that "an offender against the justice of his country can acquire no rights by defrauding that justice." That "between him and the justice he has offended, no rights accrue to the offender by flight. He remains at all time, and everywhere, liable to be called to answer to the law for his violations thereof, provided he comes within the reach of its arm." Such is the doctrine of the cases of Caldwell and Lawrence (eighth and thirteenth Blatchford's Reports), and of the case of Lagrave (fifty-ninth New York). And if the cases of Caldwell and Lawrence could be freed from the complications arising out of the residence of the prisoners within the territorial limits of the British Crown, and the fact that we received them from the authorities of the British Government in virtue of, and pursuant to, treaty stipulations, it would be sound doctrine and indisputable law.

But did Caldwell or Lawrence come within the reach of the arms of our laws? They were surrendered to us by a foreign sovereign to be tried for specified crimes, and were forcibly brought for the purposes of those trials within the jurisdiction of our Courts, and the point in issue was not whether the prisoners had secured immunity by flight, but whether the Court could proceed to try them without disregarding the good faith of the Government, and violating the "supreme law."

The legal right of a judicial tribunal to exercise jurisdiction in a given case must, from the nature of things, be open to question at some stage of the proceeding; and we find it difficult to conceive of a person charged with crime being so situated as not to be permitted to challenge the power of the Court assuming the right to try and punish him.

The doctrine of the cases of Caldwell and Lawrence has been sanctioned by several prominent British officials and lawyers, and has seemingly been acted upon by some of the Canadian courts, and in one instance (that of Heilbronn) by an English court. We say seemingly, for the reason that in Great Britain treaties are regarded as international compacts, with which in general the Courts have no concern. They are to be carried into effect by the executive, and the proceedings in the Courts are subject to executive control to the extent necessary to enable it to prevent a breach of treaty stipulation in cases of this kind. Hence, when a party charged with crime claims immunity from trial on account of the provisions of the treaty under which he has been extradited, he must apply to the executive to interfere, through the law officers of the Crown, to stay the action of the Court; otherwise it will not, at his instance, stop to inquire as to the form of his arrest, nor as to the means by which he was taken into custody.

But a different rule prevails with us, because our government is differently organized. Neither the Federal nor State Executive could interfere to prevent or suspend the trial of Hawes. Neither the Commonwealth's Attorney nor the Court was to any extent whatever subject to the direction or control either of the President of the United States or the Governor of this Commonwealth.

But the treaty under which the alleged immunity was asserted being part of the supreme law, the Court had the power, and it was its duty, if the claim was well founded, to secure to him its full benefit.

The question we have under consideration has not been passed on by the Supreme Court of the United States, and it therefore so far remains an open one that we feel free to decide it in accordance with the results of our own investigations and reflections.

Mr. William Beach Lawrence, in the fourteenth volume of the *Albany Law Journal*, at page 96, on the authority of numerous European writers, said :—

"All the right which a power asking an extradition can possibly derive from the surrender must be what is expressed in the treaty, and all rules of interpretation require the treaty to be strictly construed; and, consequently, when the treaty prescribes the offences for which extradition can be made, and the particular testimony to be required, the sufficiency of which must be certified to the executive authority of the extraditing country, the State receiving the fugitive has no jurisdiction whatever over him, except for the specified crime to which the testimony applies."

This is the philosophy of the rule prevailing in France. The French Minister of Justice, in his circular of April 15, 1841, said: "The extradition declares the offence which leads to it, and this offence alone ought to be inquired into.

The rule, as stated by the German author Heffter, is, that "the individual whose extradition has been granted cannot be prosecuted nor tried for any crime except that for which the extradition has been obtained. To act in any other way, and to cause him to be tried for other crimes or misdemeanours, would be to violate the mutual principle of asylum, and the silent clause contained by implication in every extradition."

And when President Tyler expressed the opinion that the treaty of 1842 could not be used to secure the trial and punishment of persons charged with treason, libels, desertion from military service, and other like offences, and when the British Parliament and the American Congress assumed to provide that the persons extradited by their respective governments should be surrendered "to be tried for the crime of which such person shall be so accused," this dominant principle of modern extradition was both recognized and acted upon.

This construction of the tenth article of the treaty is consistent with its language and provisions, and is not only in harmony with the opinions and modern practice of the most enlightened nations of Europe, and just and proper in its application, but necessary to render it absolutely certain that the treaty cannot be converted into an instrument by which to obtain the custody and secure the punishment of political offenders.

Hawes placed himself under the guardianship of the British laws by becoming an inhabitant of Canada. We took him from the protection of those laws under a special agreement, and for certain named and designated purposes. To continue him in custody after the accomplishment of those purposes, and with the object of extending the criminal jurisdiction of our Courts beyond the terms of the special agreement, would be a plain violation of the faith of the transaction, and a manifest disregard of the conditions of the extradition.

He is not entitled to personal immunity in consequence of his flight. We may yet try him under each and all of the indictments for embezzlement, and for uttering forged paper, if he comes voluntarily within the jurisdiction of our laws, or if we can reach him through the extradition clause of the Federal Constitution, or through the comity of a foreign government.

But we had no right to add to, or enlarge the conditions and lawful consequences of his extradition, nor to extend our special and limited right to hold him in custody to answer the three charges of forgery, for the purpose of trying him for offences other than those for which he was extradited.

We conclude that the Court below correctly refused to try Hawes for any of the offences for which he stood indicted, except for the three charges of forgery mentioned in the warrant of extradition, and that it properly discharged him from custody.

The order appealed from is approved and affirmed.—*Albany Law Journal*.

CARRIER—"Paintings"—*Carpet patterns*.—The word "paintings" in the Carriers Act means articles of artistic value as paintings. Models and working designs for carpets and rugs, painted by hand and skilfully designed, but of — in the carpet trade only, are not within the class designated.—*Woodward*
ton and North-Western Rail. Co., 47 L. J. Rep., Exch. 263.

THE JOURNAL OF JURISPRUDENCE.

ON THE SUPPOSED DECLINE IN THE CHARACTER AND PROSPECTS OF THE SCOTTISH BAR.

WHOEVER meets persons who were acquainted with the lawyers of Edinburgh twenty years ago, or still more any of the few survivors of Edinburgh society before the death of Jeffrey, now nearly thirty years ago, is pretty sure to hear lamentations as to the state of the Scottish Bar, which, these praisers of past times say, is not and will never be again what it once was.

The same topic has become common with the writers in London newspapers and reviews on the rare occasions when they pay any attention to the affairs of Scotland. Indeed, not the Bar only, but Scotland generally, is a butt for their satire, and it is a significant fact that the character of this profession should be considered so intimately associated with the character of the country. It is a convenient excuse for almost total ignorance of what is going on in Scotland, that nothing is going on there worthy of note.

A third class of persons, now not so numerous as they were when they were gaining for themselves a certain political standing by denouncing what they were in the habit of calling The Parliament House Clique, rather than by any great merits of their own, still go on repeating the same complaint, although such a Clique exists only in their own imagination.

It seems worth while to inquire what amount of truth, if any, there is in this opinion with regard to the decline of the Scottish Bar, which outside of legal circles is still undoubtedly prevalent, and also to ask whether, so far as it is true, it is necessary or desirable that it should continue to be true. Scottish advocates have reason to be proud of the past of the profession to which they belong, but they could not be so did they not know that the eminence of the Scottish lawyers of the sixteenth and seventeenth, of the eighteenth, and of the first half of the nineteenth century, contributed largely to the general welfare of all classes of society, to the reputation of Scotland, and not merely to the honour and dignity of the legal pro-

fession. Though writing as a lawyer, and addressing readers who are almost entirely members of the legal profession, it will be the aim of the present writer to consider the subject without professional bias.

The present appears a fit moment for its consideration, as the Government Bill with reference to the proposed appointment of an Under Secretary of State, whatever may be its merits or demerits otherwise, has certainly had the advantage of rousing the attention of the Bar to its present position. Nor is it wise to disguise the fact that this condition will continue unless a change in the character and opinions of the legal profession, which has begun to show signs of its existence, is carried on. The Bill of the Home Secretary may either be the symbol of the diminished consideration in which the Bar is held, and will continue to be held, by politicians, or it may be the occasion of an increase amongst its members of that public spirit which formerly distinguished it. Beyond this remark it does not fall within the scope of the present paper to consider a measure whose fate will probably be decided before it is printed. Nothing here said would, indeed, probably have much effect upon that Bill; for Scottish members of Parliament have, it is to be feared, not yet recognised it as one of their duties to subscribe to the *Journal of Jurisprudence*, or to acquire even an elementary knowledge of Scottish law. If they had, we should not have witnessed the somewhat humiliating spectacle of the time of the House of Commons being occupied by the Lord Advocate endeavouring to make his fellow-members understand what was meant by a servitude, and Mr. Cross, as an English common lawyer and ex-chairman of sessions, enlightening them upon the benefit of what he was allowed to suppose was a peculiar English discovery of giving notice by boards at either end of a road that it was proposed to shut it up.

What, then, to look this subject, however disagreeable, straight in the face, is the true contrast between the present and the past condition of the Scottish Bar? It does not consist in any marked difference in the extent of its legal attainments. We may challenge all gainsayers and detractors upon this point. The talents required for the successful discharge of legal business may not be quite the same as they once were. For example, written arguments are now so seldom required as to form a quite inconsiderable portion of practice. An occasional admirer of the old Session Papers may be found, who would be inclined to express an opinion that their disuse has led to a decline in solid and exact learning; but since the death of Lord Benholme this school has no representative on the Bench, and it had long before ceased to have any representative at the Bar. On the other hand, skilful oral pleading and the tact required in the examination of witnesses is of somewhat more importance than was formerly the case. But, taken all round, there can be little doubt there is as much learning as well as ability in debate, and in the management of litigation in its various

branches, as at any previous time in the history of the Court of Session. The principal business of the Bar is confined, no doubt, at present to a comparatively small circle, but this has always been more or less the case. Natural and proper as well as unnatural and improper causes combine to produce that result. Some recent examples have at least shown that there is an ample reserve of talent ready and able to take its place within the circle when the opportunity is afforded. It may be reasonably doubted whether this reserve was ever greater than it is at present, or if there was ever a time when the sum-total of legal knowledge was greater. Much of it may be allowed to run to waste through the lack of sufficient experience, which is so necessary in all professions, and in no profession more than in that of the law. But it is none the less in existence; and if the possessors of it persevere in spite of temporary discouragement, they may have reasonable hope that opportunities will arise when it will be of use both to themselves and the country.

But if no fair observer can contrast the present condition of the legal profession with reference to legal knowledge unfavourably with that which was its condition in former times, the case is very different as regards general knowledge, the position it occupies in regard to public affairs, and the regard in which it is held by the public at large. For some time back, of course with exceptions, the general tendency of the profession, and especially of several of its leading members, who always find many imitators, has been studiously to abstain from taking the least share in public business or the slightest real interest in intellectual pursuits. The causes of this have been various—sometimes genuine modesty, a quality which good lawyers possess in a higher degree than the public give them credit for; sometimes the belief that their talents do not lie in these directions; sometimes contempt for politics and political parties, and for any form of work which is not highly remunerative; sometimes a lack of interest in anything except the business of litigation; sometimes a prudent calculation that to manifest any interest of this kind is dangerous to professional prospects. But whatever the causes, the result has been in the highest degree injurious both to the legal profession as a whole, and to the community at large. This has been the real cause of the mode in which the attempt has been recently made to disparage the office of Lord Advocate. Some persons attribute too much importance to the accident of the office of Home Secretary being temporarily held by a gentleman of the character of Mr. Cross. We purposely refrain from expressing any opinion on the question as to the expediency of appointing an Under Secretary for Scotland, which is distinct from the subject to which this paper is devoted. In the proposal itself there is nothing novel. But the manner in which it has been made on this occasion, and the mode by which it is to be carried out, are certainly novel, and would

have been impossible had the Bar retained the position it occupied forty, or even twenty, years ago. Assuredly those persons have much to answer for to their profession whose talents and opportunities might have enabled them to maintain the splendid traditions of honourable public service in literature as well as political life which their predecessors, from the time of the institution of the Court of Session till a comparatively recent date, handed down to them.

But if the Bar has suffered from this cause, so also has the public. No country can afford to lose the services of a considerable class of its intelligent citizens. In the management of public business and the conduct of legislation especially, though not exclusively, the experience of trained lawyers is of great value. That the wisdom of a legislator is one thing, and that of a lawyer another, is an apophthegm often repeated since Bacon uttered it. It is a true saying when properly understood. The legislator must be able to rise above the merely conventional views and purely professional opinions which sometimes exercise a considerable and undue influence on the conduct of lawyers when they are transferred to other spheres of action than the Courts. The lawyer must use a precise mode of argument and expression, instead of the loose and easy style of Parliament. The character of a lawyer could not stand the remarks which have sometimes to be made upon the disingenuousness of Parliamentary answers, and the unfairness of Parliamentary debates.

But Bacon's saying is altogether misapplied if it leads to the conclusion that lawyers may not be good legislators, or that legislators should be, as they often at present are, persons ignorant of law. The proper combination for a legislator is one who knows both how to make and how to interpret laws. It would be better that the mutual disparagement of each other by members of Parliament on the one hand and judges and lawyers on the other should cease. Each may easily gain a victory in words by exposing the defects of the other, but while this wordy rivalry continues, Great Britain is exposed to the contempt of Europe as the country which, with the most elaborate machinery for law-making, makes almost the worst laws. What a commentary on the absence of the right sort of lawyers from Parliament it is, that the man in England who has been thought the most capable of preparing its Criminal Code has never been able to obtain a seat in it!

Probably few persons who have considered this subject with any care would not now be disposed to contest the conclusion which follows from the previous remarks as regards Scotland. It is generally felt to be desirable that Scottish lawyers should resume the position they have for a time abandoned, should again be distinguished, as they once were, as the members of a liberal profession who were not intent upon making private fortunes, though at the risk of the sacrifice of public interests. This opinion is not now confined to

members of the legal profession itself, for it has become evident that just in proportion as the Scottish Bar has receded from public affairs, Scotland itself has lost its influence and its proper place in the counsels of the nation. But it is more easy to destroy than to construct or to reconstruct. Many persons are now undoubtedly disposed to abandon hope with regard to an object which, however desirable, they consider unattainable, or at least as so difficult of attainment that practical, prudent men will not waste their strength and endanger their prospects in striving for it. The writer does not share this opinion, or the present paper would not have been written. He does not shut his eyes to the special circumstances which produced an abnormally splendid growth of talent at the Scottish Bar at the end of the last and the beginning of the present century, nor to the special circumstances which afterwards led to a different result. It is not to be expected that the present generation will see another Scott or another Wilson, another Henry Erskine, Jeffrey, or Cockburn. These were the last brilliant rays of a setting sun. But fortunately for mankind, though the dawn often wears more sombre colours, and there may be many days of gloomy or dull weather, the sun sets to rise again, and some day and in some way often unsuspected, bursts the clouds and shines again with the old lustre. We must drop metaphors, and ask pardon of the readers of a legal magazine for this flight of the imagination. In plain language, it is necessary to recognise the altered circumstances of the present situation. The separate nationality of Scotland has passed away and will never return, but apart from this mark of nationality the qualities which distinguished the persons who inhabited the part of Great Britain north of the Tweed in time past may distinguish also those who are to inhabit it in time to come. Not Scotland only, but the great towns of northern and midland England also are gradually awakening from the delusion that it is necessary to concentrate all business and offices of importance in the metropolis, and to attract there by high premiums the intelligence and talents which are needed for the healthy life of the different parts of the United Kingdom, and the character of the whole nation.

As regards the Scottish Bar, there are not wanting indications of a new spirit, which was also the old spirit—the spirit of better times. We do not desire to exaggerate the importance of them, but they seem worthy of being noted.

In two recent elections to the highest honour the Bar has in its power to bestow, regard has undoubtedly been paid to qualities and services which a short time before were deemed of small account. In the one case assiduous attention to the best interests of the profession as a liberal calling, and to the conduct of its business as a corporation, and in the other services to legal literature, which recall those of Erskine and of Bell, received a recognition the more conspicuous as it was rendered with general concurrence and

without grudging on the part of those who might have been preferred had the amount of professional practice been deemed the principal criterion of merit.

It is notorious that neither of these elections would have been made had the suffrage rested in the same hands as it did ten or fifteen years before. They showed a change in the tendency and aspirations of the younger as contrasted with those of the older members of the profession. And it is on the former rather than the latter that the future in large measure depends.

A trifling circumstance lately indicated that the wind was setting in the same direction. When it was proposed the other day that a deputation should be sent to London from the Faculty of Advocates with reference to the Bill as to the appointment of an Under Secretary, and its adjunct the Bill to render the office of Lord Clerk-Register effete in order to pay this new official, it was contended with considerable force that such a deputation was contrary to ordinary precedent, and exposed the Faculty to the risk of failure. The premises of this argument were undoubtedly well founded, but they were rejected as insufficient. It was felt that the occasion was not an ordinary one, and that it was wise to create a precedent, and by an unwonted effort to show that the Faculty took a special interest in these measures. When a body of this kind shows itself prepared to act with vigour on an emergency, and even to run the risk of failure, it is a sign of life. It may make mistakes, but they are the mistakes of youth, which can be corrected; they are not the mistakes of decline and old age, which are irreparable.

Another new and gratifying fact is the attempt which has been made by several members of the profession to enter Parliament. Apart from party considerations, and without presuming to offer an opinion upon the individual cases, it may be said that the legal profession generally has regarded this attempt with approval, and entertains a hope that when next made it may be attended with better success. How different this is from the state of things within recent memory, when neither urgent party representations, nor the desire of constituencies, could induce Scotch lawyers, eminently qualified to serve their country in Parliament, from undertaking that honourable though no doubt arduous duty.

It is necessary here to guard against possible misapprehension. The writer trusts that nothing which has been said in this paper will be deemed to favour the idea which has unfortunately been sometimes realized in the sister kingdoms, that a Parliamentary career may be undertaken as a mere stepping-stone to professional advancement. This has deteriorated both the character of Parliament and the character of the legal profession in England and Ireland. It has conduced more than anything else to the comparatively low estimation in which lawyers in Parliament have often been held. If any symptom appears of an endeavour to base a

claim for promotion, either at the Bar, or still more to the Bench, upon mere political party services apart from legal qualifications, the opinion of the profession in Scotland may be trusted to prevent it from succeeding. But it is to rush into the opposite extreme to promote a condition of things under which lawyers as a class shall not merely be excluded from Parliament, a circumstance which can affect of course only a small number, but also find their voice, which ought to be always and commonly is the voice of intelligence and reason and sound judgment, scarcely heeded or heeded only to be despised. The legal profession was once excluded from the House of Commons by statute in England, and the Parliament in which this was done has received in history the title of *Parliamentum Indoctum*—the Ignorant Parliament. Without express statute the same condition has been to some extent realized by the existing representation of Scotland.

On the other hand, we must not be oblivious of the fact that while Scottish lawyers have been neglecting public affairs and concentrating their whole interests on professional practice, other classes of the community have been adopting a precisely opposite course. It may almost be said, painful as it is to a lawyer to say it, that the legal profession has been becoming more mercantile, when merchants, traders, and artisans have been becoming more alive to those interests which concern them, not merely as individuals but as citizens. For the former circumstance, from the standpoint of the individual, many palliations, sometimes a complete defence, can be made, but none from the standpoint of the profession. It cannot expect to retain honours for which it ceases to care or to exert itself to deserve. The latter circumstance is far from being a subject for regret. It is for the good of the nation that all classes should interest themselves in the business and prosperity of the commonwealth. But it is not for the good of the nation that lawyers should be an exception in this respect. No qualities are more requisite for the proper conduct of national affairs than those which belong to their special calling—coolness, clear-sightedness, accurate reasoning, impartiality,—in a word, the judicial virtues which experience has shown, in spite of a plausible opinion to the contrary, and some shafts of satire, the honourable practice of advocacy does not impair but rather cultivates in fair minds to a high degree of excellence.

Meantime Scottish lawyers will do well to avoid despondency, or, what is still more fatal, indifference or cynicism, for despondency alternates with hope; indifference never rises above the dull, dead level of the commonplace; cynicism blights the qualities of the intellect and the heart, without which nothing considerable has ever been accomplished. To many members of the legal profession, indeed to all except a few specially favoured or fortunate individuals, the motto must be for many years,

*"Nitor in adversum : nec me quis cætera vincit
Impetus."*

Let this also be the motto of the profession at a time when it too might be tempted to yield to despondency. It has great memories, but if it is to prove itself worthy of them, it must not rest content with them. If the Bar is to resume its former position, there must be an increase and revival amongst its members of public spirit. Political life is one, but it is only one, of the ways in which this spirit may be manifested and make itself felt, and the occasion of this paper has perhaps led to more than its proper share of importance being allowed to it. Such increase and revival requires exertion on the part of a number of persons in many different directions, each working in his own way towards the same end, and daring to run the risk of failure, and of being misunderstood by those whose good opinion he values.

NOTES ON THE EDUCATION FOR THE SERVICE OF THE STATE IN CONTINENTAL COUNTRIES.

II. GERMANY.

As might be anticipated, it is from Germany that the fullest information on this subject has been received, for it is to Germany and not to England that Scotland must look for any substantial improvement in those parts of its university system which bear upon professional and practical life.

The information as to Germany is derived from four separate authorities, each of the highest character. The venerable Bluntschli communicates the results of a long lifetime devoted to this branch of education, and to the composition of works relating to politics which have an international as well as national importance.

Von Holzendorff, the well-known editor of the best *Encyclopædia* of Jurisprudence produced in this century, and equally at home in the educational arrangements of North and South Germany, states the present condition of the education of the servants of the State in Bavaria, a country which has taken a leading part in the scientific progress of Germany in the present century in law and politics, as well as in the natural sciences.

Professor Seeger gives the existing conditions and the projects of reform in Wurtemberg, a small country, but one whose experience on this subject possesses considerable value, as it first made, in the University of Tübingen, the experiment of a separate faculty for the political sciences, and as it has the honour of having produced the distinguished publicist, the late Robert von Mohl. To the conclusions of this writer we shall in the sequel direct special attention.

Professor Schmolle describes the arrangements in the newly-

founded University of Strasburg, which may be taken to indicate the most recent views of German statesmen and jurists as to the order and organization of this branch of education.

The answer of Bluntschli to the inquiry of the Scottish University Commission is as follows:—

In the German States it is the rule that several years of study at the universities is a preliminary condition for nomination to judicial offices and the higher administrative offices. University degrees are in most states not necessary, and have rather a social than a legal value. Only for university professors the degree of doctor is as a rule required.

Members of the legislative bodies are for the most part elected, but in exceptional cases nominated by the Government. For these university studies and degrees are not necessary.

A university education is required in the case of judicial administrative and diplomatic officials, including professional consuls (*Berufs Consuls*); consuls for trade (*Handels Consuls*) do not require this qualification.

Where a university education is necessary three or four years is generally the time required, but sometimes a shorter period suffices.

It is usually prescribed that certain classes of the Philosophical Faculty, with a view to secure a liberal education, should be attended, and afterwards a series of legal and political subjects (including political economy) must be studied. The distinction between the legal and administrative departments which has been carried out in the arrangements of the various public offices has not yet been so strictly recognised in the system of instruction and examination, so that the examination of candidates for both kinds of office, except of those for purely financial and accounting offices, is often the same. Recently, however, for the first time, attempts have been made for the careful separation of the two branches. As regards examinations for the public service, the rule is that at the close of the university curriculum there is a State examination by a Commission or Board appointed by the State, often with the assistance of professors. Some years later there is a second examination after the candidates have had some practical experience of the public service. The first examination relates to the subjects taught in the universities, and the second to questions of practice. The usual age of candidates for the first is from twenty-one to twenty-four, and the second examination is passed two or three years later.

In a letter Bluntschli adds, "The German system of making university studies a condition for governmental offices has proved successful with us. It secures the higher education of the official classes, and limits the arbitrary choice of princes and ministers. As we have not an aristocracy of birth or wealth, we form by this means an aristocracy of education.

"Academical degrees have not for a long time been required as a

condition for State appointments. For these the State examination decides, which is more or less independent of university examinations. The only university degree with us is that of Doctor: the degrees of Bachelor and Licentiate have gone out of use. There are, however, (1) *doctores juris*, according to old custom still *juris utriusque*, i.e. Civil and Canon Law; but the Canon Law is now of very slight importance, and for the most part Constitutional Law and Criminal Law are substituted for it; and (2) *doctores philosophiæ*, with special reference to the Political Sciences, Constitutional Law, and Political Economy. In some universities there are also doctors in the political sciences (*Staatswissenschaftliche Doctoren*).

"My experience is that mixed Examination Boards of State officials and professors are better than those which are composed exclusively of either. Our University Faculties have been handed down from an earlier time, and do not adapt themselves to our modern relations. The distinction of the judicial and administrative departments in life should lead to a similar distinction in the university system, either by dividing the Faculty of Law into two Faculties, one for Jurisprudence, including Civil Law, Criminal Law, etc., and the other for Political Science, including 'the general Doctrine or Theory of the State,' Constitutional Law, Administrative Law, and Political Economy. In my opinion it would be more expedient that there should be two departments of one and the same faculty, which should be called the faculty of the Political and Legal Sciences."

The answers of Von Holzendorff, formerly Professor of Law in Berlin, now professor in Munich, apply exclusively to Bavaria; but he has appended to them a valuable paper on the question much agitated in Germany, whether it is expedient to have separate Faculties of Law and of Political Science, or to unite both in one Faculty, the substance of which we shall give after his statement of the existing conditions of these studies in Bavaria, which is as follows:—

All the higher branches of the Civil Service require the attendance at a university for a period of four years, the first year to be applied to philosophical study, the other three years to jurisprudence and political science.

No academical degree is necessary, except for admission as a university teacher or *privat-docent*. The degree of doctor is awarded by the Faculties after the strictest examination of candidates, and has only a social value; it gives no privilege with regard to the Civil Service. It is almost impossible to give any reliable enumeration of the different branches of the service which require the certificate of preliminary university study. Generally speaking it may be said: "All the higher branches of the Civil Service for which *technical training* of a superior kind (as, for instance, in railway, postal, or mining administration) is not necessary." The most important branches of the higher service are the following: (1) The

superior administration of the Revenue Laws (Finanzen, Zölle, Steuern); (2) Councillors in the ministerial departments and boards; (3) State administration or inspection of schools; (4) State inspection of Church matters and the public worship; (5) the diplomatic and paid consular service of *consules missi*; (6) Government inspection of mining and railways; (7) the judiciary department.

As a rule, all the candidates for the higher Civil Service—except the merely technical departments of mining and engineering—must have been inscribed as members of the Juridical Faculty for a period not under three years, and of the Philosophical Faculty for one year, forming the beginning of the academical study.

No particular lectures are prescribed to students; naturally, however, the subjects of the first examination, held at the universities, form at the same time the subject-matter of lectures resorted to by the great majority of the students. Without any strict necessity the following lectures are usually attended, the subsequent examinations resulting in a strong degree of compulsory attendance at the usual lectures: (1) Eight courses of lectures on different topics belonging to the philosophical department, the choice of the particular lectures being left to the student (such as history, philosophy, natural science, chemistry, mathematics, etc.); (2) History and Institutes of the Roman Law; Pandects of the Roman Civil Law; (3) History of the German Law; (4) System of the German and Feudal Law; (5) Commercial Law; (6) Civil Procedure; (7) Ecclesiastical and Canon Law, including Matrimonial Law; (8) Criminal Law; (9) Criminal Procedure and Pleading; (10) Constitutional Law of the German Empire and the State of Bavaria; (11) Administrative Law (also under the title of *Polizei-Wissenschaft*); (12) International Law; (13) General Politics (*Allgemeines Staatsrecht*); (14) Private Bavarian Law; (15) The Philosophy of Law.

No degree is required for candidates for the Civil Service, but a certificate testifying to the candidate's acquirements in the theory of jurisprudence and political science is necessary. Prior to examination he has to show that he has duly passed through his first academical year, and subsequently heard a convenient number of law lectures. The omission to attend particular law lectures would not be held sufficient ground for refusing admission to the State examination.

General politics or *Allgemeines Staatsrecht*, not strictly belonging to Jurisprudence, is taught by a professor of law, and the same is the case with Philosophy of Law, taught concurrently by professors of the Philosophical and Juridical Faculties. Besides, the Faculty of Political Science offers lectures under the following heads: (1) History of General Civilization (*Allgemeine Culturgeschichte*); (2) Politics; (3) Political Economy; (4) Administrative Law; (5) Science of Financial Administration; (6) Statistics; (7) Some lectures, partly administrative, partly technical, such as the law and administrative practice of mining, forests, and agriculture.

The non-technical administrative departments of the Civil Service are based on the following principle of division:—

1. The junior candidates in order to be admitted as unpaid volunteer-officials must have passed their university examination (conferring *no* degree).

2. The senior candidates to be entitled to definitive appointments must submit to a second (practical) examination, called the *Staats-Concurs* or State examination, to which they are admitted after a probationary period of three years.

As above mentioned with regard to the higher branches of the Civil Service, *two* examinations must have been passed by candidates: (1) The so-called first or theoretical examination, annually ordered by the King, and held by the professors of the Law Faculty; and (2) the second or "State examination."

The first examination is passed before *eight* professors of the Juridical Faculty or the Faculty of Political Science. In Munich commonly one professor of Political Science acts in combination with seven professors of Law, the latter being selected with a view to have a fair representation of the different branches of Jurisprudence. The examination takes place in the presence of a Government Commissioner, and is public.

The second examination is held by Government Commissioners not appointed for this purpose exclusively, but selected among the most eminent members of the Civil Service.

The first Government examination held by the professors, annually appointed by Royal order in council, covers the ground of the previous academical study.

The second State examination supposes, of course, the continuance of the same degree of theoretical attainments; in addition, it requires evidence as to practical experience during the period of volunteer service, which as a probationary period must have been performed by candidates under the title of "practicants." The second examination, as the first, is quite the same for the members either of the Judiciary or the Higher Civil Service.

As I have shown, we cannot speak of university degrees taken in Bavaria. The degree of doctor is exceptionally taken by a few students for the sake of honour, or with a view to become afterwards a professor. The usual age of candidates for the first academical examination is between twenty-one and twenty-four, the average perhaps being twenty-three; as to the second State examination it is about twenty-six, the age in each individual case depending on the length of that period, which every student before his admission to the university will have passed in the Latin school or *gymnasium* in accordance with the prescriptions, requiring a certificate called the "*Absolutorium*" in Bavaria, and corresponding to the "*Abiturienten Examen*" of the Prussian *gymnasium*.

From the above remarks it will be seen that in Bavaria the same method of academical education and practical training

obtained by probationary, voluntary, and unpaid service applies to the members of the Judiciary, and to those of the higher Civil Service.

From the letter to which we have alluded above we make the following extracts: "In my eyes the organization of political and legal education is at present a vital question for civilized nations. Party cries (*Schlagwörter*) are in public life nearly exhausted. We cannot get better laws if we do not prepare our future legislators better and more thoroughly at the universities. Without reform of legal education England can never, according to my decided conviction, obtain a satisfactory codification." On the question of the expediency of instituting a separate Political Faculty, Von Holzendorff thus expresses himself: "For a long time we believed in Germany that a correct division of labour required the erection of Political Faculties in the universities. Now the opinion of the learned classes has altered on this point. We consider it better to unite political and legal studies, and to institute Faculties for Law and Politics (*'Rechts und Staatswissenschaft'*).

"In the latest university foundation, that of Strasburg, this has been done.

"In Munich there is a separate Political Faculty. The result is, according to my observation, unfavourable to the division of the two branches of study. My reasons against separate Faculties for Law and Politics are: 1. The political sciences have no independent theoretically distinct basis. They are either practical and dogmatical, and if so cannot properly be separated from constitutional law (*Staats Recht*), or they are philosophical and historical studies, and if so they should be united with the Philosophical Faculty, as in Prussia.

"2. A so-called political education without a sufficient and thorough legal preparatory education appears to me worthless and even hurtful.

"3. In Munich almost all those who attend lectures on political subjects are students of law. The Political Faculty has only about a dozen special students, and five ordinary, and one extraordinary, professors. There is therefore no practical need for the division of the two Faculties.

"4. There are, properly speaking, only two specific political subjects, Political Economy (including Finance) and Statistics. The other subjects in the Political Faculty—Administrative Law and Police Law—are taught by a member of the Faculty of Law; the History of Civilization might be taught by a historian, and Arboriculture (*Forstwissenschaft*) should be taught in connection with the natural sciences. Great advantage, on the other hand, arises from the union of the most important political studies with the Faculty of Law. All that is necessary is procured if, in addition to a sufficient representation of the studies which belong to Public Law, in

its widest sense, one or more professorships for Political Economy and one for Statistics are established.

"The advantages which would result from this union are: 1. The external connection of Jurisprudence and Political Science would prevent the mere doctrinal and abstract tendencies which often come forward under the name of Political Science.

"2. The extravagant and injurious preference given in Germany for the study of the Roman private law would be avoided by the additional importance and strength which would be imparted to the study of Public Law by the introduction of professorships of the Political Sciences in the Faculty of Law."

There is much in these answers which has a special bearing upon a state of university education to which we are strangers in this country. We assuredly do not require to be warned against the institution of a separate faculty for the political sciences when as yet these sciences are, with the exception of Constitutional Law and International Public Law, scarcely recognised. If they are to be recognized at all, it will certainly be in connection with the Legal Faculties of our universities. Nor is it likely that in either England or Scotland too great importance will ever be attached to the study of the Roman Law. But we have not felt at liberty to abridge, on account of the difference between the two countries, the interesting observations of Von Holzendorff. We fully expect also that his communication, as well as that of Bluntschli, will at first sight tend to impress on the minds of some readers the impression that Germany is over-lectured and over-professored. To a certain extent we share this opinion, but it is better to defer such reflections as occur to us upon this point until we are in possession of the whole evidence. At present we content ourselves with noting that the opinions of Bluntschli and Von Holzendorff are on all essential parts, although given independently of each other, in complete accord. These essential parts may be thus summarized:—

1. A university education in the legal and political sciences is required in Germany for candidates for all the higher departments of the State Science, administrative as well as judicial.

2. A university degree is not required.

3. It is expedient, according to the prevailing opinion of the persons who have considered this subject in Germany, that the political sciences should be taught in the same Faculty as legal studies, and not in a separate Faculty.

4. The circle of political duties should include at least the Philosophy of Law and the State, Constitutional Law, Administrative Law, Public International Law, Political Economy, and Statistics.

Æ. M.

THE BILLS OF EXCHANGE ACT, 1878.

THE law relating to the mode of acceptance of bills of exchange has long been settled in Scotland, where the subscription of the drawee has been always required to render him liable upon the bill, and his subscription has been by itself held to imply acceptance. In the law of England, on the other hand, a promise, written or oral, to accept a bill was held to be an acceptance, and it has been said that any conduct of the drawee by which he intended the holder should understand that he meant to accept or pay would amount to an acceptance of an existing bill. It was even doubted whether the mere detention of a bill by the drawee would not amount to an acceptance; and many fine distinctions were drawn which were really inapplicable to such documents, and only served to introduce uncertainty into mercantile dealings. In order to remedy this state of matters the Act 1 & 2 Geo. IV. c. 78 was passed, by which it was enacted that "no acceptance of any inland bill of exchange shall be sufficient to charge any person unless such acceptance shall be in writing on such bill, or if there be more than one part of such bill, on one of such parts." This Act was by the English Courts interpreted as meaning that some writing on the bill, such as "accepted," "presented," "seen," or even the day of the month without the subscription of the acceptor's name, was sufficient to bind him. There was thus left a certain degree of uncertainty which it was considered advisable to remove, and accordingly by 19 & 20 Vict. c. 97, s. 6, it was enacted that "no acceptance of any bill of exchange, inland or foreign, shall be sufficient to bind or charge any person unless the same be in writing on such bill, or if there be more than one part of such bill on one of the said parts, and signed by the acceptor or some person duly authorized by him." In the Mercantile Law Amendment (Scotland) Act of the same year a section in identical terms was introduced, but this section was understood to be a mere affirmance of the common law of Scotland, to which the law of England had been assimilated. In Scotland, prior to the passing of the Act, if a person subscribed his name to a blank bill stamp he was held to give authority to fill up the bill with any sum which the stamp would carry, and in *Cameron v. Morrison* (20th Jan. 1869, 7 Macp. 282) Lord President Inglis said: "It is common for an acceptor to sign his name upon a blank slip of stamped paper, leaving the drawer at liberty to fill it up for the largest amount which the stamp will cover; and it has not for a long time been questioned that when the bill is filled up and signed by the drawer that constitutes a valid obligation against the acceptor." While the general practice was for an acceptor to write the word "accepted" above his signature, it was understood that the omission to do so did not affect his liability, and a very large number of bills in England as well as in Scotland bore no

acceptance except that implied in the signature of the drawer. A decision of the Common Pleas Division on appeal from the County Court of Northumberland, however, once more created a difference between the law of Scotland and that of England, and imperilled a large amount of property. In the case of *Hindhaugh v. Blakey* (2nd March 1878, 3 C. P. Div. 136), Justices Grove and Denman decided that a signature on a bill of exchange by itself was, under the section of the statute quoted above, insufficient to charge the drawee. They held that the Act required both a written acceptance and also a signature, and that the subscription of the drawee no longer implied acceptance. This decision, which was undoubtedly inconsistent with the law as laid down by the Scotch Courts, and proceeded on a very technical construction of the Act of Parliament, was received with surprise and incredulity in banking circles, where the decision, though distinct and unambiguous, was spoken of as merely raising doubts. The same language was used in the bill, which was at once introduced into Parliament by Sir John Lubbock, to declare the law relating to the acceptance of bills of exchange. That bill was passed through both Houses of Parliament, and received the Royal assent on 16th April 1878, within little more than six weeks of the judgment in *Hindhaugh v. Blakey*, which had excited the fears of the banking interest. That Act, after reciting the section in the Mercantile Law Amendment Acts of 1856, and narrating that "doubts have arisen as to the true effect and intention of the said enactment, and as to whether the signature of the drawee alone can constitute a sufficient acceptance of the bill so as to satisfy the requirements of the said statute," proceeds to enact that an acceptance of a bill of exchange is not and shall not be deemed to be insufficient under the provisions of the said statutes by reason only that such acceptance consists merely of the signature of the drawee written on such bill.

By this enactment the law of England has again been assimilated to the law of Scotland, and a construction of the statutes of 1856, which could only have worked hardship and injustice, has been authoritatively refuted. While admiring the celerity with which Parliament has removed the "doubt," one cannot but sympathize with the unfortunate litigant whose case has been the occasion of the construction of the section which Parliament has so speedily declared to be erroneous. The powerful banking influence in Parliament, and the constant watch which members such as Sir John Lubbock and Mr. Hubbard keep over all proceedings in the Courts of Law or in Parliament, which may tend to affect, however slightly, interests so sensitive as those relating to money, sufficiently account for the short time between the discovery of the blot in the statute, or the erroneous construction put upon it, and the Parliamentary remedy. In many other branches of the law such "doubts" might have remained unnoticed except by the unfortunate persons

affected, who might not be possessed of Parliamentary influence sufficient to secure the speedy remedy of the mistake.

If there were a minister of justice charged with the duty of observing the decisions of the Courts of Law, and at once taking measures to amend any flaw which the ingenuity of lawyers might discover in Acts of Parliament, the improvement of the law would be more rapid and more certain than it can be under the present system, when important amendments upon the law as interpreted by the judges are left, as in the present case, to the zeal of private members. If a code were enacted, some regular system of revisal and amendment would have to be introduced, so as to secure that the working of the code should not be productive of serious evil; and even now the institution of such a system of supervision could not fail, if properly carried out, to lead to the gradual amelioration of the law, and might perhaps be useful in paving the way to the codification of the law. The present system of haphazard amendment is certainly capable of improvement, and the ease with which this bill was carried through Parliament shows that there would be little difficulty in working some well-considered system of revision of case law, at least so far as relating to the interpretation of statutes.

CRIMINAL CODES.

AMIDST the innumerable Bills now in Parliament struggling for future existence as Acts—some with a good chance and some with no chance at all; some under the patronage of Government and some in the feeble hands of the private member—appears a measure which has for its object the codifying of the English Criminal Law. It is not likely to become more than a measure this session; for although it bears the Government stamp, and can claim the respectable parentage of a Government law-officer, other things are more pressing. The English Criminal Law has stood in its present form for centuries, or rather has been going on through the centuries enduring successive modifications in some respects and additions in others. Many will be inclined to think that it may last their time. It does not affect the interests of the community so closely as the Civil Law would do; the class who are most deeply interested have not as yet got representation in Parliament. Any scheme for law reform has, however, this advantage—it is generally left by the lay members of the Legislature to be discussed and disposed of by their legal brethren. He must be a bold man who, without special training, will venture to involve himself in the intricacies of the pleading and procedure of either the Old Bailey or Westminster, or call in question the argument of the Attorney or

Solicitor General when these dignitaries favour the House upon a professional question. But there is no probability of our seeing England under a criminal code for some little time at least. We may rest assured, however, that the matter will not drop. It is non-political in character, and is capable of being handed from one Government to another. If Conservatives have started the idea, it is not likely to meet with opposition from any other political party. The reforms which have been carried through in the Civil Courts of England, and carried through, it will be remembered, with marvellous speed, renders it by no means unlikely that ere very long some sweeping revolution will reorganize those of criminal jurisdiction.

Scottish lawyers as a rule take little interest in, and know but little about, the Criminal Law of the sister country. While we are constantly becoming more familiar with the principles, and even the technicalities, of the English Civil Law, as the commercial relations between the two countries render a familiarity with them necessary, it matters little to us upon what grounds and with what formalities a felon is convicted across the border. When we think of the English criminal procedure at all it is usually with some slight feeling of contempt for the want of system which appears in the manner of prosecution, and the absence of that machinery with which this country has been familiar for centuries. Occasionally when the curiosity of the public at the dawn of what promises to be a popular criminal trial is not gratified, there is a silly outcry in favour of the public investigations carried on in England, and for the adoption of that absurdity, the coroner's inquest. But such an outcry is, however, rarely supported by the professional lawyer, who knows better how to value the blessings of the system which we have, and to estimate the value of the arguments urged against it.

The two systems are widely different. Indeed, perhaps the only functionary connected with the administration of criminal justice whom we and our Southern neighbours have in common is the hangman. But this proposed code should interest us, because we may rest assured that if it is accomplished in England, Scotland will not be left alone. Here is a grand project for a high-handed Home Secretary with dreams of centralization—pet hobbies of his own and an impatience of Scottish interference. The Scottish code may possibly be drawn up by English hands. By the time it is called for, a Lord Advocate (in all but name) may be a thing of the past, although, perhaps, the advice of that shorn and shrunken official may still be asked, and even followed.

It would be desirable if by any possibility a code brought about a greater uniformity in the character of sentences. At present the nature of the punishment depends more frequently upon the judge who inflicts it than upon the crime committed. One judge upon the Scottish Bench is known to award a few weeks' imprisonment in cases which would certainly call forth penal servitude from

another of our learned Commissioners. It is impossible to exclude altogether the exercise of the judge's discretion, there are some cases which depend so much on the surrounding circumstances, as, *e.g.*, cases of fraud; but surely it is possible to render the sentences pronounced in our criminal courts in some degree less anomalous. There is one crime which upon conviction has invariably the same sentence imposed; that crime is murder. And yet under the term murder there are classed offences which in strict justice should not be dealt with as if alike in degree of guilt. The man who deals a hasty blow and he who uses poison, prepared with deliberation and administered in cold blood, do not deserve the same punishment. As it is, compassionate juries take refuge in verdicts of not proven or of culpable homicide, inconsistent with fact or with legal definition.

It is also desirable that no act should be punished as a crime in the one country which may be committed with impunity in the other. This is the case with at least one offence of great magnitude in Scotland, and not so rare as might be wished. Incest is still nominally a capital crime with us; in England it merely exposes the guilty parties to Church discipline.

To codify and bring into harmony the criminal law of the two kingdoms may be a labour followed by beneficial results.

SOME RECENT DECISIONS—TWENTY-SECOND AMERICAN REPORTS.

ON the subject of life insurance we find two cases directly in conflict. In *Guardian Mutual Life Insurance Company v. Hogan*, 80 Ill. 35, it is held that the relation of father and son does not give the son an insurable interest in the life of the father, unless the son has a well-founded or reasonable expectation of some pecuniary advantage to be derived from the continuance of the life of the father. On the other hand, in *Reserve Mutual Insurance Company v. Kane*, 81 Penn. St. 154, it is held that the son has an insurable interest in the life of his father, especially where the son is liable under the poor law for the support of the father. We vote with Illinois on the point. The matter being one simply of pecuniary interest, no person has an insurable interest in the life of another unless it is a pecuniary advantage to him to have the other live. In the Pennsylvania case it was for the son's interest to have the insured die.

Dogs and "niggers" make a good deal of trouble in this volume. In *Heisrodt v. Hackett*, 34 Mich. 283, a statute authorized "any person" to kill a dog going at large, and not licensed or collared. In an action to recover for the killing of plaintiff's dog by defendant's dog, *held* no defence that plaintiff's dog was not licensed and collared, as defendant's dog was not a "person." We know the converse of this to be urged once. Sidney Smith when

solicited by Landseer, the famous animal painter, to sit to him for his portrait, exclaimed: "Is thy servant a dog, that he shall do this thing?" In *Rider v. White*, 65 N. Y. 54, it is laid down that one injured by the bite of a dog may recover damages of the owner on proof that the dog was vicious, and that the owner knew it, without showing that it had ever bitten any one. So much for dogs. Now for the other "animals" mentioned. Down in North Carolina the law-makers have such a delicate sense of the fitness of things that they regulate marriage somewhat by complexion, and pronounce marriages between negroes and white persons unlawful. (Probably they will not suffer Othello to be acted in their theatres.) So in *State v. Ross*, 76 N. C. 242, the Court had a good deal of self-command to adjudge that where a white woman left the State to be married, in another State, to a negro resident thereof, but not intending to return, but was so married, and afterwards did return, the marriage was lawful in North Carolina. But in *State v. Kennedy*, 76 N. C. 251, where a negro man and a white woman left the State to be married, with intent to evade the law and to return, and were married in another State where such marriages were lawful, and did return, the marriage was held invalid in North Carolina. But not only do live "niggers" make the courts trouble, but dead ones do also. In *Mount Moriah Cemetery Association v. Commonwealth*, 81 Penn. St. 235, it is held that a by-law of a cemetery association prohibiting the burial of negroes therein is void as to persons who were lot owners when the by-laws were passed. We have known of cemeteries prohibiting the interment of dogs, but this is the first instance of the extension of the prohibition to negroes that has come to our notice. Judge Gordon sits down on the cemetery folks in this lively manner: "In a sound code of ethics this prejudice never had a respectable standing, for it was but the child of an abnormal servile system that was entitled to no man's respect outside of the country and laws which maintained it. But at this time, when this prejudice is under the ban of recent constitutional and legal provisions, expressly designed for its suppression and extinction, it is scarcely to be expected that we can be induced to endorse its respectability, or to encourage it to linger longer around the halls of justice." Judge Sharswood said, "I dissent from this judgment and opinion."

We don't often run across an elegant classical quotation in a judicial opinion, but C.-J. Appleton makes one in *Meador v. White*, 66 Me. 90. It is here held that an action cannot be maintained to recover money loaned on the Lord's day.¹ The Court regretting the statute, and pointing out the anomaly that while both parties are equally guilty, one is punished and the other is rewarded, quote from Juvenal—

"Multi

Committunt eadem, diverso crimina fato;
Ille crucem pretium sceleris tulit, hic diadema,"

¹ See Journal of Jurisprudence, vol. xxi. p. 408 [Ed.].

which, if we may be allowed to serve as interpreter, may be thus rendered into the vernacular—

“Of two who equally deserve law’s frown,
One gets the cross, the other takes the crown.”

New Hampshire still continues the banner State for long opinions. Here in *Hardy v. Merrill*, 56 N. H., we have twenty-two pages to demonstrate that non-professional witnesses may testify to their opinion of a testator’s sanity, founding their opinion upon their knowledge and observation of his appearance and conduct. A good deal of the opinion was omitted too. An interesting opinion, however, on a very important subject. The Court made one mysterious observation, namely: In *M’Kee v. Nelson*, the Court says: “There are a thousand nameless things, indicating the existence and degree of the tender passion, which language cannot specify; precisely what Judge Bellows, in *Whittier v. Franklin*, said of the frightened mental condition and sulky disposition of a horse.” We did not know that the equine race are peculiarly subject to the “tender passion,” but it seems to be judicially affirmed. Again, the Court says: “Evidence of this character was received a few weeks ago in the trial of Magoon for murder in Rockingham county, with the intimation of a doubt concerning its competency; and the very able and vigilant counsel upon both sides in that cause knew what they were about, and omitted nothing of their duty to the prisoners or to the public.” Assuming that the counsel really did “know what they were about,” it seems a rather curious reason for judging of the competency of evidence. Then the Court wax quite lively: “But one witness says, ‘he did not appear as usual; he did not appear natural.’ Now, let us imagine a scene that might very probably be exhibited where the Massachusetts rule prevails. ‘Very well,’ says a learned barrister, ‘very well, Mr. Witness, you may say that; that is quite regular, that is your opinion. Now tell us in what respect he did not appear “as usual” or “natural.”’ ‘Well, I can’t describe it, but I should call it wandering, delirious; he was incoherent in his talk.’ ‘Very well, Mr. Witness; you acquit yourself like a sensible man. Now tell the jury whether, in your opinion, he was then of sound mind.’ ‘I object!’ thunders the learned barrister on the other side. ‘I object!’ thunders the opposing junior; ‘counsel know better. It is an insult and outrage to put such a question.’ ‘I object!’ ‘I object!’ echoes from every side. The court-room is in an uproar. The Judge has to exert himself to keep the peace. The lawyers on each side are all talking at the same time in a very delirious and incoherent manner. The witness is confounded. The jury are confounded. Everybody is confounded,” etc. So are we. Are we reading a grave law-opinion or one of Charles Reade’s court scenes? Sometimes the Court in the “Granite State” indulges in a little pardonable sarcasm on the rhetoric of the attorneys. Thus, in *Simpson v. City Savings Bank* (56 N. H. 466), the Court

observe: "In the plaintiff's brief it is suggested that 'this law of 1874 touches the heart blood of this plaintiff,' etc.; "but now, if he suffer in the matter of costs, his tribulation will be caused not so much by the law of 1874 as by his own persistent disregard of the law." Truly, it was a great mistake on the part of the New Hampshire legislature to endeavour to compel the judges of that State to write shorter opinions.

Several cases in Wisconsin are of interest. *Hoyt v. Hudson* (41 Wis. 105), holds that the burden of proving contributory negligence is on the defendant, and that the plaintiff is not bound to show an absence of negligence on his part;—a holding which strikes us as more reasonable than our own rule. In *Heart v. Stickney*, 41 Wis. 630, a note, bearing interest payable annually, and transferred after maturity of interest and non-payment of interest, was held open to all defences, even in the hands of an innocent holder; which is consistent with *Newell v. Gregg*, 51 Barb. 263. In *State ex rel. Drake v. Doyle*, a statute was held constitutional, which required foreign insurance companies, as a condition precedent to being licensed to do business in that State, to agree not to remove into the Federal courts any actions brought against them in the State courts. The U.S. District Court of the Western District of Wisconsin had previously held the Act void.

The case of *Hayes v. Livingston*, 34 Mich. 384, is very interesting, and will probably give rise to considerable discussion, although decided by a very able court. The decision is in effect that under the statute of frauds it is not permissible that an estoppel *in pais* should work a transfer of the legal title to land. The Court concede that the rule is different in respect to personal property. They concede, too, that in regard even to real estate the rule is different in Maine, Georgia, Vermont, Pennsylvania, Connecticut, and New York. They seem to concede, too, that the injured party might find relief in equity, and distinguish the New York doctrine on the ground of the abolition of the distinction here between the legal and the equitable tribunal. It may be that the inability of the Courts of Law to take cognizance of the facts constituting the estoppel may support the decision in this case; but we cannot quite clearly see any other reason for it. We cannot at this moment assent to the idea of the Court that it would be impolitic to defeat the statute of frauds "by a technicality so shadowy and unsubstantial." Still we offer these views with diffidence, and shall endeavour hereafter to examine the matter more thoroughly.

This volume has many valuable notes.—*Albany Law Journal*.

INTERNATIONAL JURISDICTION.

III.—SCOTLAND.

THE claims of the Scotch Courts to jurisdiction over Englishmen and Irishmen have still to be considered. They may be compared

striatim with the cases in which the English and Irish Courts allow service out of the jurisdiction. The first case is where land situated within the jurisdiction, or any act, deed, will, or thing affecting such land, is the subject-matter of the action. This very much resembles, and in practice is probably identical with, the Scottish rule which bases jurisdiction on the "beneficial possession, whether natural or civil, of immovable estate within the realm, whether permanently or temporarily, upon a good title of possession" (Lord President Inglis in *Fraser v. Fraser*, 8 Macp. 404). No doubt the English rule is not limited to the case of the defender being in beneficial possession as a matter of fact. But it is difficult to conceive of a case in which an action relating to a landed estate would be directed against a defender who either did not possess, or at least did not claim a beneficial interest in the land. If that be so, the jurisdiction of the Court would never be disputed by the defender, because in doing so he would be judicially negating the interest which he claimed in the property. The decisions upon this ground of jurisdiction in Scotland were given chiefly in cases where the claim made was not connected with the property, and where, therefore, the undisputed fact of property was ascertained. But there is little doubt that the Court of Session would entertain any action relative to landed property in Scotland whether the parties were otherwise subject to its jurisdiction or not, because unless these parties had a real or pretended interest in the subject the action would be unintelligible. Apart from legal principle, which in such matters is probably that of allegiance to the Crown, from whom the land is ultimately held, there is an obvious convenience in having a question of property law (generally the most abstruse, technical, and peculiar of laws) decided in the Courts of the country in which the property is situated. No doubt other considerations might intervene. Especially in the case where a deed or will executed in England disposing of land in Scotland is challenged upon grounds of fraud or error, requiring proof in England, there might be a balance of inconvenience against the *forum rei sitæ*. But the principle is a sound one, and although it may often give rise to conflicting jurisdictions, the exercise of which demands moderation and temper from the Courts of both countries, it has frequently been recognised in cases relating to the administration of a succession. (M'Laren on Wills and Successions, i. 48-52.) On the other hand, it must be kept in view that the possession of landed property in Scotland renders the owner liable to an indefinite number of actions not connected with the property, while in England and Ireland apparently such possession does not of itself create jurisdiction, except in actions relating to the property itself. This difference is remarkable. It was clearly brought out in the case of the *Carron Company v. M'Laren*, which we notice below, where Lord Cranworth said that the existence of property within the jurisdiction would make execution effectual, but would not of itself render the owner liable to the local jurisdiction.

The second case mentioned by the Rules of Court in England and Ireland is where stock or other movable property is situated within the jurisdiction, or where the ground of action is any act, deed, will, or thing affecting such movable property. In certain special questions connected with the distribution of an estate by multiplepointing, this ground of jurisdiction has been recognised (*Miller & Ure*, 16 Sh. 1204). But such cases really belong to the doctrine of *commune forum*, as in an English administration or a Scottish sequestration. But it has been broadly stated in a work of authority (Mackay, Practice of the Court of Session, i. p. 173) that the mere existence of movable property in Scotland will not confer jurisdiction.¹ The authority cited for this proposition, viz. *Merchants of Dundee v. Spence*, Morr. 7328, is certainly insufficient. In that case, which was decided in 1666, wine had been sold to an Englishman who had disappeared, and the vendor asked the Court for a warrant to resell the wine, which was in danger of perishing. This was refused, on the ground that the time for appearance on the summons had not arrived. What order might have been granted after the defender had failed to appear the decision does not even suggest. In the modern case of *Jones v. Samuel*, 24 D. 319, where arrestment in Scotland of a ship was held not to create jurisdiction against an English mortgagee, it was suggested by Lord Justice-Clerk Inglis that if the pursuer "had applied for an interdict against removing the vessel out of the jurisdiction of the Court, and had he then applied for delivery of the vessel—that being a proceeding *in rem*, and the vessel being within the jurisdiction of the Court—I would have had no doubt of the competency of the proceeding." How far this jurisdiction *in rem* might have been carried does not appear, but the case shows that it would have been exercised against the English mortgagee, although his interest in the movable subject was not considered to be one which an arrestment might convert into a ground of jurisdiction. The jurisdiction *in rem* is one amply justified by necessity, for unless you enforce the decree of a foreign court it is the only means of reaching the subject. It is, perhaps, not clear why an acre of land should have more extensive consequences in imposing liability to be sued upon its owner than a large and valuable stock of merchandise. The former, indeed, has more of the character of a permanent investment. It may be said to imply a closer and more lasting connection with the country in which it is situated. And accordingly the Scottish rule extends liability to actions not connected with the subject: of course subject to the exception of actions affecting status. In *Trowsdale's Trustee*, 9 Macph. 93, a doubt was expressed whether heritage subjected the owner to purely personal claims in the local jurisdiction. And the absence of Scottish decisions, recognising even the more limited liability in the case of movable

¹ But see Lord Deas in *Ferguson, Rennie & Co.*, 1 Macph. 750.

estate, is partly explained by the peculiar Scottish institution of arrestment *ad fundandam jurisdictionem*, which applies not indeed to movable estate in the possession of the debtor himself, but to movable estate in Scotland belonging or due to the debtor, but in the hands of another, not a mere servant. As in the famous Toothpick case (*Lindsay v. London*, N. W. Rly. Co. 3 Macq. 107) and others, this remedy has been pushed to an extreme length, for the Courts accept a jurisdiction to deal with the largest claims, although only a most insignificant sum has been arrested. Perhaps the more reasonable view of the proceeding is that the foreign debtor should be forced to appear or to give security for appearing under the penalty of losing the local fund, which alone is directly subject to the decrees of the local court. This, however, is not the view which has prevailed. As regards petitory conclusions, the jurisdiction has been affirmed to an unlimited extent; but the odd distinction has been taken between such conclusions and those purely declaratory or reductive (see Lord Neaves in *Lindsay's* case). This distinction does not arise under the Rules of Court in England and Ireland, where the subject-matter of the action may be any act, deed, will, or thing affecting the movable property. But these rules would probably be held not to include the second general exception to Scottish jurisdiction constituted by arrestment or depending on the possession of heritage, viz. all questions of status. Where the question of status was a necessary incident to the assertion of a right of property, the rules would probably be administered in the spirit of the Scottish decision of *Bell v. Bell*, 26th Feb. 1812, F. C., and their phraseology does not suggest that any independent question of this kind could be raised. Among other interesting illustrations of the way in which the Scottish rule of arrestment operates, we may mention the case of *Longworth v. Hope*, 3 Macph. 1049, in which, by arresting trifling sums in the hands of Messrs. Blackwood and Edmonston & Douglas, the pursuer was enabled to sue the proprietors of the *Saturday Review* in Scotland for damages for libel, although it seemed to be admitted by the judges that the mere fact of publication in Scotland would not have been sufficient to found proceedings in the *locus delicti* against the foreigners who had published. Such a publication within the jurisdiction, as "an act for which damages are sought to be recovered," would probably be held sufficient to warrant an order for service abroad under the English and Irish Rules. In Longworth's case the Scottish judges (except Lord Ardmillan) did not see any inconvenience in the case being tried in Scotland, but the impression which the decision leaves is that if the jurisdiction is not open to serious objection on the ground of inconvenience, it ought to be placed on some safer and more intelligible foundation than the existence of a balance of a few pounds in the hands of a Scotch correspondent of the English defender. Then in *Clements v. Macaulay*, 4 Macph. 583, the Blockade runner case, arrestment of funds in Scotland was held to

give jurisdiction in an action to enforce a contract of joint adventure between persons living in Texas and Louisiana and who were in no other way than by the arrestment connected with this country. Lord Barcaple thought his Court was not a proper and convenient *forum*, and was influenced in thinking so by the fact that the jurisdiction appealed to by the pursuer was not inherent in the Court, but an artificial one created by himself. But the Inner House thought that there was no inconvenience in the action proceeding.

The next ground of jurisdiction mentioned in the English and Irish Rules is that of a contract made within the territory, and sought to be enforced or set aside, or for the breach of which damages are sought. We may, however, take along with this the case of an act done within the territory in respect of which damages are sought to be recovered, or, as it would be called in Scotland, a delict or quasi delict occurring within the territory. They are taken together because the Scottish law requires in each case personal citation, that is, presence of the defender within the territory over and above the locality of the contract or the locality of the delict. As Huber says: "Contractus forum tribuit, si contrahens in eodem loco reperitur." The best-known modern cases on this subject are *Sinclair v. Smith* (22 D. 1475), where a promise of marriage was given in Scotland by a domiciled Scotchman who, before the date of action, had become a domiciled Englishman, but who was cited personally in Dundee; *Johnston v. Strachan* (23 D. 758), where a fraudulent misrepresentation about a company was made in America by a Scotchman by origin, who was cited within ten days after he had left a house which he tenanted in Aberdeen for America; and *Kermick v. Kermick* (9 Macph. 984), where a slander was uttered in Kirriemuir by a domiciled Englishman who was personally cited at Kirriemuir. In the first and third cases the jurisdiction was sustained; in the second refused, as it also was in *Crichton v. Robb* (22 D. 728). The judgments of Lord-President Inglis contain the whole law and learning on the subject. It will be observed that the English rule of jurisdiction based on "delict," without the defender's presence in the territory when citation is issued, resembles in principle the criminal jurisdiction which is founded on the *locus delicti*, pure and simple. The Scottish principle, like that of most European nations, France being an exception, is founded on the Roman law (l. 19, *de judiciis*). According to the statement of this principle in a fourth case, *Pirie v. Warden* (5 Macph. 497), it also includes the case where not the *locus contractus* in the primary meaning of these words, but the *locus solutionis* is within the territory. In that case a charter-party was made at Alexandria to be performed by delivery at Aberdeen, and the jurisdiction, even of the Sheriff Court at Aberdeen, was sustained in an action for implement or damages against the owner of the ship, who belonged to Liverpool. The judgment bears to proceed on the Admiralty statutes, 11 Geo. IV.,

and 1 Will. IV. c. 69, and 1 & 2 Vict. c. 119, but as they simply give the Sheriff every "legal ground of jurisdiction," the decision is one of importance on the common law. Indeed, if citation in the place of performance be sufficient, this almost amounts to the only remaining ground of jurisdiction in the English and Irish rules on which it is necessary to say anything; viz. breach within the jurisdiction of a contract wherever made. In *Johnston v. Strachan*, Lord-President Inglis speaks of "the cause of action, be it contract or delict, clearly arising within the territory." We have seen from the English and Irish decisions how difficult it is for Courts to give an impartial definition of "cause of action," which, however, in its latest interpretation, is held not necessarily to include the contract itself, but is satisfied by the occurrence of a breach. Breaches of contract are of course most likely to occur in the *locus solutionis*; and therefore, except in the matter of citation within the territory, the Scotch and English jurisdictions based on breach of contract may be said to be practically the same, although, of course, the English rule gives much greater room for refined distinctions as to what amounts to a breach of contract.¹

It may be said that the Scotch Courts, while not making all the claims put forward by the Courts of the sister countries, have certain compensations. Such cases as *Calder v. Wood* (19th Jan. 1798, F. C.) and *Ritchie v. Fraser* (15 D. 205) show that the rule of forty days' residence sometimes leads to considerable inconvenience. It is of course necessary to give a positive definition of the length of residence required to found jurisdiction. Then it appears from the Lord-President McNeill's opinion in *Ritchie v. Fraser*, and from the opinions of Lord-President Inglis in *Sinclair v. Smith* and *Johnston v. Strachan*, that the element of *origo*, if combined with personal citation in the territory, or at least with the *locus contractus vel solutionis*, might found jurisdiction. It is certain that in *Peddie v. Grant* (1 W. & S. 710), generally relied on as negating, the jurisdiction based on domicile of origin, there was no personal citation within the territory, but merely edictal citation. And in *Johnston's* case Lord Kinloch confessed the sins which he had committed in *Sinclair v. Smith*.² But while the Scotch rules on this subject may be imperfect, it must be remembered that in theory the English Courts are apparently ready, subject to the rules of comity, to proceed against any person found in the territory, because they have a power of constraint over his body. The English Rules, to which we have so frequently referred, come into operation only where it is necessary to serve beyond the jurisdiction.

(To be continued.)

¹ But see Logan, 3 Irv. 323.

² See the old form of decree against a Scotchman abroad: "To have execution against his person when he came to Scotland, and against his goods and gear in Scotland" (Muirhead, Mon. 4814).

Correspondence.

THE DEAN OF FACULTY ON THE LORD CLERK-REGISTER AND UNDER-SECRETARY OF STATE BILLS.

To the Editor of the Journal of Jurisprudence.

SIR,—I went recently to London along with three of my brethren, at the request of the Faculty of Advocates, to endeavour to explain the views which they entertain as to the impolicy and injustice of the scheme set forth in these two Bills, now before the House of Commons. These Bills are not necessarily connected with each other, although they practically are so. The salary of the Lord Clerk-Register has been set free by the death of Sir William Gibson-Craig, and this salary it is now proposed to divert from its purpose and appropriate to the payment of an Under-Secretary of State, who is to be a member of the House of Commons, and to assist Mr. Cross there. The Bills do not say so, but it was so said when the Bills were introduced. It is the temptation of the vacant salary that has suggested the idea to Mr. Cross of the Under-Secretary of State. If he had not thought that this money was within his reach, neither the one Bill nor the other would ever have been heard of. If it be necessary to create this new office—if it be the fact that all Lord Advocates are incompetent to conduct Scottish business in the House of Commons—though they have done it since Duncan Forbes of Culloden's time—surely a salary for it might have been obtained from imperial taxation without paralyzing one of our most prosperous and useful national institutions.

The Lord Clerk-Register of Scotland is to be abolished in everything but name, and the Secretary of State in London—that is, the new Under-Secretary—is to manage and control the registration system of Scotland quite easily—and discharge at the same time all the general functions of a Secretary of State. I desire, before this scheme is further proceeded with, to state a few facts connected with the institution, about which I found, when I was in London, that there existed considerable misapprehension and ignorance.

The office of Lord Clerk-Register has been in existence in Scotland from the earliest periods of our history. As far back as the age of King David II. he appears in royal charters as an officer of note. He is one of the commissioners to whom Edward I. directed his writ, commanding the delivery to him of the public muniments of the kingdom of Scotland; and throughout the reigns of all the Scottish kings, from Bruce's time downwards, he appears as a high officer of State, and is expressly so designated in statutes of the Scottish Parliament. To him were intrusted the whole of the public records, of every kind, in regard to Parliament, courts of law, and private titles; and at the time of the union with England,

the Act of Parliament which ratified the treaty contains this express declaration in regard to these records: "That the records of Parliament, and all other records, rolls, and registers whatsoever, both public and private, general and particular, and warrants thereof, continue to be kept as they are within that part of the United Kingdom now called Scotland, and that they shall so remain in all time coming notwithstanding of the union." This is the enactment of the Act 1707, cap. 7; and the proposal now is, that this condition of the treaty between the two kingdoms shall be violated, and that the public records shall no longer be kept as they have hitherto been, by an officer of State responsible for them.

The duties of the Lord Clerk-Register extend not merely to the superintendence and control of the Register House in Edinburgh, but to all the public records of the kingdom of Scotland. He has a general superintendence of the registers of deeds and protests kept by the town-clerks of the various burghs, and of deeds, probative writs, and protests kept by the sheriff-clerks of the various counties. The books of register kept by the sheriff-clerks are issued to them by the Lord Register; and all the records of the subordinate courts transmissible to the General Register House, must be delivered over to the Lord Register to be kept by him for the use of the public, as provided for by the statute 49 George III. cap. 42, sec. 12. With reference to the Register House itself he has a large establishment under him—a Deputy Clerk-Register, a Deputy Keeper of Records, Official Searchers, Keepers of the Registers of Deeds, of the Registers of Sasines, Inhibitions, and Adjudications, of the Register of Hornings, of the Record of Entails, curators of the Historical Department, and the office of Director of Chancery, with many other offices too numerous to mention.

To keep an establishment like this in working order, it is obvious enough that there is required very considerable powers of administration and very close and constant attention. To do the work thoroughly, there is also required legal knowledge, at least to this extent, that there must be an acquaintance with the nature and objects of the various records. In a report of the Commission of 1818 appointed to examine as to the legal institutions and departments of Scotland, of which Sir Ilay Campbell was head, there is a detail given of the steps by which the system of Scottish records was brought to the perfection it had attained, by means of the judicious exercise of authority on the part of the Lord Register. In the following passage the Royal Commissioners state their own opinion, and also that of a great antiquarian lawyer to whom the record system of Scotland is so much indebted—the late Thomas Thomson: "By this decision, the right to a general superintendence and control of the public registers, which had been at all times vested in this officer, and the exercise of which, constituting a powerful check

upon the subordinate persons employed in these departments, is essentially connected with the interest of the community at large, was fully recognised and enforced. Without an efficient control of this nature, indeed, the advantages derived from this valuable part of our national establishment would be extremely insecure, and in the course of time could not fail to be very essentially impaired. As justly observed by the Deputy Clerk-Register, in his official report dated 31st December 1807, 'The original formation of the several sorts of public records, whether of a more general or of a local description, is necessarily intrusted to a multitude of individuals in a great measure unconnected with one another; but in consequence of arrangements partly accidental, and partly the result of a sagacious and provident policy, all, or nearly all, of these individuals have been subjected more or less immediately to the superintending vigilance and control of one high officer of State, whose authority and influence were meant to pervade every department, and thus to bind together the whole in a connected and vigorous system.'

The office of *Deputy Clerk-Register* was constituted by royal warrant, under the sign-manual, only so late as June 1806. By this authority power was given to the Lord Register to appoint a deputy, to be resident in Edinburgh, "duly qualified by his education and studies, being an advocate of the Scottish Bar, of undoubted learning, tried merit, and considerable standing," to whom under the Lord Register the superintendence of the institution should be confided, with a yearly salary of £500. The office is not an old one, therefore; and it has been held only by two persons—Thomas Thomson, and the present holder of the office, Mr. Pitt Dundas. During Mr. Thomson's time, he was ably assisted by Lord Frederick Campbell, the Lord Register of the day, in those labours of his, which have contributed so much to the preservation of our national records, and for which his country owe him a deep debt of gratitude. The office of Deputy Clerk-Register was created for Thomas Thomson, in order to utilize his vast antiquarian knowledge. After his resignation his *role* was very efficiently discharged by his successor, Mr. Pitt Dundas. After Sir William Gibson-Craig's appointment, the duties of the office were performed by himself, and the office of Deputy-Register was not pressed with onerous work. It would appear that the deputy is to be continued, for the Bill provides that "the right of appointing to the office of Deputy Clerk-Register shall be vested in the Commissioners of her Majesty's Treasury." Such an officer is useless, if a competent Lord Register be appointed, who will, as Sir William Craig did, *personally* perform his duties, and this is what we want. There is no need for two men, if one can do the duty. A competent man should get both salaries, and work for them. A dummy in London doing nothing but drawing the salary, and a deputy in Edinburgh doing all the work, will not answer in these

times. What is wanted is a man with firm will, administrative ability, business aptitude, and knowledge of the law. Such a man may be procured if he be paid as he ought to be; and an ample salary may be allowed him without taking, as I shall immediately show, one shilling from the Imperial Exchequer.

The proposal under this Bill is to take away the salary which under the Act of 1868 was attached to the office of Lord Clerk-Register of Scotland, or "Lord Register of Scotland," as he is called in the statutes during the present century. Though the salary is to be taken away, the *name* is to be still kept up; but "no rights, authorities, privileges, or duties shall be attached to the office," except in two cases. The *first* of these exceptions is that he shall remain Keeper of the Signet, and have the power of appointing a Depute-Keeper and officers in the Signet Office. The *second* is that he shall have the power of presiding at the election of the representative Peers of Scotland.

The two pieces of work thus left to the Lord Register are of the most trifling description. The Signet is the King's seal for judicial proceedings, and is affixed to certain legal writs, which require to pass through the Signet Office, and for which certain fees are paid. The mechanical operation of affixing this signet makes little demand upon the intellect. A Deputy-Keeper (or a man under him) does it, and the Keeper receives a salary of £350 for so doing. The nomination to this office, when a vacancy occurs, is still to be left with the gentleman who is henceforth to retain the name of Lord Register of Scotland. It was only in the year 1817 that the Keepership of the Signet was handed over by the Act 57 Geo. III. cap. 64 (sec. 7 and 8) to the Lord Register, as he is called in the statute. Why the Treasury did not take power, by this Bill, to make the appointment of Deputy-Keeper of the Signet, as they have taken power under it to appoint all the other officers in the Register House, it is not very easy to understand. In fact, the proper parties to appoint this Deputy-Keeper seem to be neither the Treasury nor the Lord Register, but the Writers to the Signet, whose *ex officio* chairman he is.

The other piece of business which is still left with the Lord Register is the presiding at the election of representative Peers of Scotland, on the occasion of a new Parliament. But this also is a duty which is not specially attached to the office of Lord Register. The principal clerks of Session are equally entitled with him to preside and conduct the election; and until Sir William Gibson-Craig's appointment, they were the officers who fulfilled this duty. Except, therefore, for the purpose of affording some kind of excuse for still retaining the name of Lord Clerk-Register, the special clause which saves to him all his rights, powers, and privileges as regards the Peers' election, might have been quite fitly left out, and the name of the office swept away, with all the powers which gave to the name a meaning.

The Register House of Edinburgh is an institution which pays its way. It is both useful and profitable in a money point of view. The Imperial Exchequer is entitled to receive annually £13,000, at least, of fees collected from the persons who require to take advantage of the institution, and this, too, after payment of every farthing of expense. The mode of collecting the fees in the Register House is by stamps, which are purchased at the various stamp offices throughout the country, and the amount paid is ascertained by the number of cancelled stamps counted at the end of each quarter. The salaries are not deducted from the fees and the surplus paid over. The salaries are paid by moneys voted by Parliament, and the net profit to the country arising from the institution is ascertained by deducting from the value of the cancelled stamps the amount of the salaries paid to officials, and the expenses laid upon cleaning and for coals to the establishment.

In the year 1868 there was passed the Act 31 and 32 Vict. cap. 64, which authorized the Treasury to prepare amended tables of fees; and in the year 1873, in consequence of the remonstrances of Sir William Gibson-Craig, the fees exacted from the public were very greatly reduced. In that year the surplus paid into the Exchequer came to nearly £20,000, and the Lord Register took up a firm position—representing that it was unjust to exact so much money from a limited class of the people of Scotland, to be applied to the purposes of the Imperial Exchequer. This remonstrance on his part was successful, and the scheme which he laid before the Treasury was adopted, as communicated in the following letter by Mr. Law of the Treasury to the Lord Register on 14th February 1873:—

“In reply to your letters of the 31st ult. and the 3d inst., further respecting a revision of fees in certain departments of the General Register House, under the 25th section of 31 and 32 Vict. c. 64, I am desired by the Lords Commissioners of her Majesty's Treasury to state that, adverting to the explanations now given, my Lords are prepared to approve of the reduction of fees in your Lordship's department, and in the department of the General Registry of Sasines, including certain fees in the General Register of Hornings, to the extent particularized in the several documents which accompanied your letter of the 22d ult., involving a total reduction of fees to the extent of £16,852, and leaving a probable surplus, *after defraying expenses*, of about £2593. My Lords quite agree with your Lordship, that it would not be prudent to carry this reduction further until experience shall have shown the actual amount which the reduced fees will produce.”

There was thus left a surplus of £2593, which it was thought would be necessary to keep in hand, in case of diminution in future years. This trepidation, however, as to the future was groundless. Instead of there being a diminution the surplus has mounted up, if not to the figure which it had reached in 1873, yet it is fast

approaching it. The matter stands thus upon the two departments—1. The Department of the Lord Clerk-Register, including the Searching Department, for the year ending 31st March 1878:—

INCOME.			
Lord Register's Department	.	.	£2984 5 9
Searching Department	.	.	6344 6 5
			<hr/> £9328 12 2
EXPENDITURE.			
Lord Register's Department	.	£2493 16 4	
Searching Department	.	4015 7 0	
			<hr/> 6509 3 4
			<hr/> £2819 8 10

Thus there is, after paying all salaries, a surplus of nearly £3000 in these two departments alone; and in the expenditure is included the salary of the Lord Register down to the day of Sir William Gibson-Craig's death.

The other great money-making department is that of the General Register of Sasines. The amount paid to Exchequer from this department for the year ending 31st March 1878 was as follows:—

Recording fees	.	.	.	.	.	£30,076 18 0
Fees of extracts	.	.	.	.	.	1,001 19 8
Fees of searches	.	.	.	.	.	113 16 0
						<hr/> £31,192 13 8

From this sum of £31,192, 13s. 8d. there falls to be deducted the expenses of the office. These are found set forth in a return to the House of Commons in August 1877, No. 427, as follows:—

1. Salaries, including emoluments of writing clerks, for the year 1876-77	.	.	.	.	.	£19,079 7 7
2. Share of rent of premises applicable to the Register of Sasines	.	.	.	.	.	17 10 0
3. Share of taxes applicable to the Sasine Office	.	.	.	.	.	102 11 3
4. Stationery	.	.	.	.	.	840 0 0
5. Maintenance of building and furnishing	.	.	.	.	.	435 0 0
6. Fuel, light, and water	.	.	.	.	.	140 0 0
7. Discount on fee stamps	.	.	.	.	.	293 5 8
						<hr/> £20,907 14 6

These are the proper expenses of the establishment; and the difference between the sum of £20,907, 14s. 6d. and £31,192, 13s. 8d., viz. £10,284, 19s. 2d., is the gain or surplus that would pass into Exchequer from this department.

The profit from the whole Register House is growing. But even at present we thus see that the result is as follows:—

Lord Register's and Searching Department, <i>ut supra</i>	.	£2,819 8 10
Sasine Office	.	10,284 19 2
		<hr/>
Surplus Profit,	.	£13,104 8 0
		<hr/> 2 D

I must now mention that there are a number of compensation allowances paid to the keepers of the provincial Registers, whose offices were abolished by the Act 31 and 32 Vict. cap. 64. These compensation allowances are as follows:—

John Allan, Keeper of the Register for Banff . . .	£58 12 10
Newell Burnett, Keeper, Aberdeen and Kincardine . . .	796 1 5
T. Graham, Joint Keeper, Renfrew and Glasgow . . .	1104 11 8
T. Hill, Joint Keeper, Renfrew and Glasgow . . .	2886 12 8
Aeneas Macintosh, Keeper, Inverness, Ross, Cromarty, and Sutherland . . .	202 11 10
J. M'Lean, Keeper, Wigtown . . .	65 17 2
William Miller, Keeper, Caithness . . .	60 19 7
John Murray, Keeper, Roxburgh, Selkirk, and Peebles . . .	473 16 2
G. H. Pagan, Keeper, Fife . . .	391 8 6
Robert Romanes, Keeper, Berwick and Baillerie of Lauder . . .	159 16 11
David Small, Keeper, Forfar . . .	810 19 5
J. W. Williamson, Keeper, Kinross . . .	64 10 10
	<hr/>
	£7075 19 0

These annuities will in course of time fall in. One of them has done so during the last year, and when all the lives come to an end, the Imperial Exchequer will be relieved of this payment of £7075, 19s., a payment which, however, is no burden on the Register House, but which, according to the usual mode of making compensation allowances, is justly laid by the statute upon imperial taxation. The money is paid out of the Consolidated Fund of the country, and is not imposed as a burden upon the people who pay the fees in the Register House.

Now, the law in regard to the appropriation of the fees so paid by the public is stated in the 25th section of the Lands Registers (Scotland) Act, 1868, in these words: "The fees to be drawn from the said department shall not be greater than may reasonably be held sufficient for defraying the expenses of the said department, or the improvement of the system of registration." If such be the two purposes to which, according to law, the fees are to be applied, it seems manifest enough that the Home Secretary would be violating the law by paying an Under-Secretary of State, in his office, the salary paid from registration fees to the Lord Register of Scotland. He will find, after all, that another Act of Parliament will be necessary; as it is scarcely thought even he will maintain that the paying the man whom he appoints to help him in the Home Office, is a payment towards the expenses of the Register House in Edinburgh, or the improvement of the system of registration.

The whole scheme only requires to be understood, in order to be denounced as an attempt to perpetrate a gross and scandalous injustice. If this kind of thing had been tried with reference to any similar institution in Dublin, there would have been but one voice amongst the Irish members in regard to it. But in regard to a number of our Scottish members, I cannot help thinking that

judgments, otherwise sound, have been somewhat preverted in this case by mean and petty ambitions. The office of Under-Secretary would suit a number of them very well, although the creation of it would leave the Register House without a head. If any of these members hanker after the office, and will only work for a salary, let them be patriots enough not to destroy a useful institution, and find the money elsewhere. Lord Palmerston's words in denouncing some such proposal in 1858 are very apposite here—"I cannot agree that if it is desirable to create a new office, we should go foraging among the different departments of the State in order to find out some retrenchment that would be equivalent to the extra outlay. If any unnecessary offices exist, let them be abolished, and the country will have the benefit of the saving. But do not abolish existing offices that are not unnecessary, merely to provide for the cost of a new office, which, I also submit, would in itself be very inexpedient."

Nothing can, in truth, more clearly indicate the rash and inconsiderate character of the scheme of substituting an Under-Secretary of the Home Department in London, for the Lord Register of Scotland, than the fact that he must change with every Ministry; and therefore, supposing one man to have learned some of the duties of the office, his knowledge is all lost to the country at the first turn of the wheel of politics. Whether this subject shall be a matter of interest at the coming Scottish elections remains to be seen. Many subjects less affecting the dignity and honour of our country, have obtained prominence on such an occasion, and I will be much mistaken if this one be forgotten.—I am, etc.,

PATRICK FRASER, *Dean of Faculty.*

Reviews.

Election Law. The Parliamentary Franchise, Registration of Voters, the Ballot Act, etc., being an excerpt from a Digest of Cases decided in the Supreme Courts of Scotland from 20th July 1867 to 20th July 1877. Compiled by A. E. HENDERSON, DAVID GILLESPIE, and HENRY JOHNSTON, Advocates. Edinburgh: T. & T. Clark. 1878.

THE compilers of the new volume of the Digest, the approaching publication of which is announced, have given the legal profession a foretaste of the work by issuing in advance that portion of it relating to Election Law. If the remainder of the book is equal to the part which is now before us, we can only say that it will keep up the reputation for accuracy and information which the previous volumes have enjoyed. The present part divides its subject into five heads, which treat respectively of Franchise, Registration Machinery, Questions under the Ballot Act, Election

Expenses, and Election Petitions. These five principal heads are again divided and subdivided into their several branches, the effect of the whole being to present a succinct and complete view of all the decisions which have been pronounced on the subject during the last ten years. Those who have no occasion to purchase the entire volume, but who have an interest in Election Law, will find this a most useful compendium, and one which will be absolutely indispensable to all concerned in Parliamentary election proceedings, or in revising the list of voters. The amount of care which has been devoted to it is most conspicuous, and the arrangement of the various subsections is in the highest degree convenient.

Association for the Reform and Codification of the Law of Nations.
Report of the Fifth Annual Conference, held at Antwerp 30th August to 3rd September 1877.

THE recently-published Report of the transactions of this Association at their last Conference is of considerable interest. The Association, now in the fifth year of its existence, aims at reforming and reducing to the form of a code the unsettled and ill-defined rules of the Law of Nations. Started originally in America—an outcome of the Geneva Arbitration in the “Alabama” case—it now embraces among its members a large number of eminent jurists, politicians, and commercial men, representing nearly every civilized state. Like our Social Science Congress and British Association, it holds a Conference each year at some town (a commercial centre) fixed on at the previous meeting.¹

Though the discussions hitherto may not have had much practical effect in positive legislation, there can be no question that the greatest possible benefit will result from them. The “law merchant” is cosmopolitan, and if we are to free commerce from the burdens imposed on it by the conflict of different rules of law, it must be by the production of a common commercial code. And there can be no better way to accomplish this than by a comparison of the existing different systems of positive law, and by obtaining a consensus of opinion among representative jurists and merchants as to the best rules to be adopted.

The meeting at Antwerp was under the presidency of Lord O'Hagan. In his opening address his Lordship made the following observations with reference to private international law as affecting Bills of Exchange: “For many years there has been a growing conviction amongst jurists and mercantile people of intelligence, that there should be a common code and a uniform usage with reference to bills of exchange for the nations of Europe and the States of America. The advantage of such a code and such a usage,

¹ Hitherto the places of meeting have been Brussels, Geneva, The Hague, Bremen, Antwerp. The next Conference is to be held at Frankfort-on-the-Maine on 20th August 1878.

if they could be established, does not appear to me to need exposition in an assembly of reasonable men. The complications, the difficulties, the errors, and the losses which arise from the want of them, are of every day's experience in commercial affairs. That the change is practicable seems nearly as plain as that it would be of inestimable advantage. All nations in which such instruments are employed for the purposes of commerce have a common interest in making them, by a simple, speedy, and universally-intelligible procedure, promptly negotiable and easily convertible."

The Report before us shows that the work gone through by the Conference in their five days' sederunt at Antwerp was very considerable. A number of important papers on various questions of public and private International Law were read and discussed (of which, however, only abstracts are printed in the Report), reports of committees considered, and, in some instances, rules agreed upon and formulated as the best for adoption in a future code. Bills of Exchange and General Average were the subjects on which the discussions took most practical shape. With regard to the former, the result of the Antwerp Conference, taken along with the preceding one at Bremen, is to be found in an appendix to the Report. This appendix sets forth in twenty-five clauses the principles for an International Law to govern Bills of Exchange. With regard to the discussions on General Average, it is to be noted that the position taken up by Lloyd's Committee seems indefensible, and conceived in a narrow spirit (see the letter of Mr. Göschel, chairman of Lloyd's, at page 85 of the Report). The principles ultimately agreed on at the Conference, for regulating General Average, though no doubt open to criticism, present on the whole a very equitable adjustment.

All lawyers, we anticipate, who regard their profession as something more than the mere routine of daily practice, will watch the further progress of this Association with interest.

The Method of Law. An Essay on the Statement and Arrangement of the Legal Standard of Conduct. By JAMES H. MONAHAN, Q.C. London: Macmillan & Co. 1878.

WITH the above rather abstruse title, Mr. Monahan has produced a small volume of about two hundred pages, containing some very interesting and suggestive matter. The object aimed at is apparently to place in a new light or bring under a new focus the general principles which underlie the system of English Law, and which, through too long habit of viewing them in one direction, have been not seldom rendered distorted, obscure, or inaccurate in many of their applications to practice.

In the introduction, after giving a definition of "Method of Law" as the "right way to set about and to conduct a systematic arrangement and statement of an existing body of working law,"

the author proceeds to explain his position. He says (p. 4): "The first step towards a useful arrangement of legal topics is the separation of all rules of procedure from the central legal principles which it is the business of procedure to uphold and to enforce. The statements of central legal principles are equivalent to the most general descriptions, found to be practically useful, of the characteristics of legal conduct—that is, conduct falling within the scope of legal rules and not violating any rule." Starting from these premises, and the ground being cleared by certain preliminary discussions—by a classification of legal topics and a definition of general terms—the author proceeds to consider these central legal principles under three leading divisions. These are (1) Protection of the person and personal freedom; (2) Ownership; and (3) Veracity; which may be taken as corresponding to a classification into rights of the person; rights of property; and obligations. Each of these headings is considered in detail, and a number of English decisions criticised with reference to them. Most of the criticisms are very just. For instance, in considering the law of obligations under the division Veracity, the absurdity of the English rule with reference to gratuitous promises—refusing effect to them even in writing unless they are under seal—is conclusively exposed (pp. 128, 129). Mr. Monahan takes the view, which is in accordance with Scottish law, that a gratuitous obligation ought to have effect given to it if only it be deliberately expressed in writing.

In a short chapter called "A Precaution against Fictions" there are some excellent remarks to which we strongly commend attention. Legal fictions are a fruitful source of confusion and uncertainty in modern law. To a certain extent, perhaps, their use is necessary, but unless they are clearly apprehended, they give birth to numberless fallacies. Mr. Monahan shows some curious results due to them in several English decisions.

In an appendix to the essay we are given an Act of 48 clauses. It is designated "An Act to consolidate and declare certain doctrines of law," and logically formulates the legal principles stated in the preceding pages. It is submitted as a model for an introductory chapter in a future code. Commencing with "Be it enacted by the Queen's Most Excellent Majesty," and ending with "This Act shall not apply to Scotland," it does not want completeness in form, whatever it may do in substance. We fear we cannot congratulate ourselves that the law of Scotland is in any less need of having the horizon of legal principles cleared than that of England.

Mr. Monahan has evidently been a careful student in what we may call the school of Austin (whose name, by the way, we notice, has been erroneously spelt Austen), and shows not a little of the precision of that writer's style. His argument is generally clear and logical, and the illustrations from decided cases, so far as we can judge, are always directly in point and forcible. Altogether,

whatever view may be taken of the novelty and value of the views indicated, the essay is highly suggestive and deserves to be attentively read.

Obituary.

THE late Mr. LIDDERDALE, Solicitor, Kirkcudbright.—At the ordinary Sheriff Court, on Friday last, Sheriff Nicolson made reference to the late Mr. Lidderdale as follows: "A few words are due in tribute to the memory of the venerable man by whose death the legal body of the Stewartry has lost its oldest member, a member so old as to have practised here long before any of us was born, when men were in their prime whose names, such as Scott and Jeffrey, are now hallowed in the traditions of Scottish law and literature. His years alone, so much beyond the ordinary term of human life, entitled him to peculiar respect and veneration. They invested him, in fact, with the historical interest that belongs to ancient relics of the past, and crowns them with dignity. In his case, as rarely happens to extreme age, there was little failure to the very last of the faculties of mind and body which served him so well during his long and useful life. The mere vigour of constitution which held out unbroken for nearly a hundred years is in itself admirable. But it was accompanied and preserved by moral qualities, without which mere length of days can never be attained, and would, indeed, be of little value. To excellent business capacity he joined strict integrity, punctuality, temperance, of a kindly and cheerful nature, without one drop of gall. Such men, if one may say it, deserve to live long. They are happy in their lives, and in their death. They are esteemed in life and are held in honourable remembrance. By the legal profession in particular, the memory of such a man as Mr. Lidderdale is worthy to be honoured, as one who did credit to his calling, who was trusted with the confidence of three successive generations, and found worthy of the trust."

Mr. A. KELLY MORISON, S.S.C. (1851), died on the 4th ult.

The death is announced of Mr. THOMAS WILSON, W.S. (1872).

The Month.

Report of the Committee of the Faculty of Advocates on the Under-Secretary of State and Lord Clerk-Register Bills.—The two Bills re-

ferred to the Committee were both introduced by the Government on 16th May last, and were read a second time on the 28th, upon the understanding that there should be a full discussion on the motion for going into Committee. The object of one is stated in the preamble to be "to make provision for the conduct in Parliament of business relating to Scotland, and for that purpose to appoint another Secretary of State." The scope of the other Bill is to deprive the office of Lord Clerk-Register of the salary and of the principal duties now attached to it.

It is obvious that the first Bill has an important bearing on the office of Lord Advocate; and the Committee think that any measure tending to affect the position and functions of that officer, considering his present place in the administration of Scotland, is a matter of great public importance.

For some years subsequent to the Union there was a separate Secretary of State for Scotland, but for more than a century the Lord Advocate, in addition to his duties as public prosecutor and first law officer, has exercised functions similar to those of a Secretary of State for the Home Department. He has instituted and taken charge of legislation, answered for the public peace, and in his place in Parliament has been generally responsible for the administration of affairs in Scotland. These functions have been discharged in strict constitutional subordination to the Home Secretary, and it has not been alleged that inconvenience has ever arisen from any actual or attempted conflict of jurisdiction. But it is doubtless true that the Lord Advocate, from his high office, and from the personal weight of the occupants of it, has enjoyed a degree of influence and independence in the administration of Scotland which would not belong to an Under-Secretary.

This system has, in the opinion of the Committee, worked well; but within the last twenty years its expediency has been more than once challenged in the House of Commons by private members of Parliament. Two grounds of complaint have been urged. In theory it has been said to be indefensible that the chief conduct of Scottish affairs should be committed to an officer selected from a single profession, and practically, Scottish business in Parliament was alleged to be neglected in consequence of the pressure of the Lord Advocate's other duties. When the proposal for the appointment of an Under-Secretary was before the House of Commons in 1858, and again in 1864, it was opposed by the leading men of both political parties, including the present Prime Minister, and met with no considerable amount of support. On the other hand, in 1870 Lord Camperdown and Sir W. Clerke, reporting as Royal Commissioners upon the state of the administration in Scotland, were favourable to the creation of the new office.

Employment could only be found for an Under-Secretary by intrusting him with some of the duties now performed by the Lord Advocate. To contract the sphere and diminish the importance

of a high office of State of great antiquity and much consideration in this country is, it will be admitted, a step not to be undertaken without justification, or, indeed, without regret. Still, such scruples ought to yield to considerations of plain public utility. But if the Lord Advocate were to be superseded or supplanted in any part of his functions by a new officer of the kind proposed, the Committee are of opinion that, so far from the change affording any security that the public business would be better performed, the result might prove to be the reverse. But for the considerable difference which exists between the laws and internal economy of England and Scotland, the Home Secretary would require no special assistance as Minister for North Britain. Owing to that difference, the aid of an officer of tried practical ability, and, above all, versed in the laws, has been found to be indispensable. The open profession of the law has proved to be an excellent school for such an official, who must be a good lawyer and man of business even more than a politician. He is a member of the Home Department and adviser of the Home Secretary, who can exercise his control and guidance in matters where the higher qualities of statesmanship are required. Accordingly, if the history of the office of Lord Advocate is traced say from the Reform Act of 1832, it will be found to have been generally filled by men of conspicuous ability, to whose capacity for transacting the business of the country in an efficient manner even the assailants of the office have been obliged to testify; and when the appointment of an Under-Secretary was proposed in 1858, Lord Beaconsfield said, "I must say my experience leads me to this conviction, that of all public offices none have been sustained during the last twenty years with such continuous ability and sound intelligence as the office of Lord Advocate of Scotland."¹ During the same period the roll of Scottish members has contained some distinguished names. But to the most eminent of these the post of Under-Secretary would not have been an object of ambition. Here, again, the field of selection is limited, and the Committee are of opinion that the country would not be a gainer if its business were transferred from men like Jeffrey, McNeill, Rutherford, Inglis, and Moncreiff, to the hands of those members of Parliament who would, probably, now aspire to the office of Under-Secretary.

The attendance of the Lord Advocate in London during the Parliamentary session is understood to have been constant and regular, at least for a good many years back, and it is understood that such attendance has been required by successive Governments. But if there is any complaint on that score, the Committee regard it as a matter of detail, which might be remedied either by making the Scottish Lord of the Treasury, who was specially appointed in 1832 to assist the Lord Advocate, the representative of that officer in his absence, or even by appointing an Under-Secretary for the

¹ Hansard, vol. cl. p. 2147.

same purpose, so long as the position of the Lord Advocate remains unimpaired as the head of all Scottish business under the Home Secretary. But the Committee do not understand that to be the object of the present Bill.

The Committee must not shrink from touching on one other point. If the office of Lord Advocate is shorn of a large part of its importance and dignity, if his functions are so far restricted that he may cease to be a Parliamentary officer at all, the change will inflict a great blow on the profession of an advocate, and through that profession, it is not too much to say, on the country. The tendencies which draw ability to the metropolis, and extinguish independent centres of cultivation and society, are already powerful enough. The office of Lord Advocate is one of the very few openings to important public employment placed within the reach of resident Scotchmen—almost the only high prize of professional life. Its natural effect has been to add dignity and attraction to the whole profession.

Upon these grounds the Committee are of opinion that the proposal to appoint a new Under-Secretary of State for Scotland is inexpedient.

The companion Bill, dealing with the office of Lord Clerk-Register, is open to the preliminary objection that it is apparently introduced for the purpose of providing a salary for the new Secretary of State by taking away the salary of the Lord Clerk-Register. The Committee would adopt the language of Lord Palmerston when speaking in 1858 against Mr. Baxter's resolution for the appointment of an Under-Secretary. He said, "I cannot agree that if it is desirable to create a new office, we should go foraging among the different departments of the State in order to find out some retrenchment that would be equivalent to the extra outlay. If any unnecessary offices exist, let them be abolished, and the country will have the benefit of the saving. But do not abolish existing offices that are not unnecessary, merely to provide for the cost of a new office, which, I also submit, would in itself be very inexpedient."¹

The Committee desire to express no opinion on the possibility of reducing with advantage the establishment, or the cost of the establishment, of the Register Office (on the ground, for example, that the duties of the Lord Clerk-Register and the Deputy Clerk-Register are practically the same). The office in the meantime yields a large surplus to the public revenue. But they think that two considerations deserve great weight. In the first place, the office of Lord Clerk-Register is like that of Lord Advocate, one of great historical interest. Originally a judge, like the Master of the Rolls, the duty of the Lord Clerk-Register was from early times the custody of the public records. By the important Act of 1617, c. 16, regarding the Registration of Writs, the public registers were

¹ Hansard, vol. cl. p. 1242.

ordained to "appertain and belong" to him; and he was empowered to appoint deputies, for whom he should be answerable. It is true that in later times the office, though a paid one, came to be regarded as a kind of sinecure. So late, however, as the present century, important services were rendered by at least one occupant of the office, Lord Frederick Campbell. Afterwards, as is well known, the office was held by Lord Dalhousie, when Governor-General of India, who neither drew the salary nor performed the duties which, during his absence, were discharged by the Deputy Clerk-Register. After his death the salary was abolished, and Sir William Gibson-Craig was appointed in 1862 to the honorary office. He found, however, that the duties of head of the department were both numerous and important. In 1866 a Select Committee, sitting on the Writs Registration Bill, unanimously and strongly recommended that the salary should be restored to the office, and that was accordingly done when the Bill became law in 1868.

The Committee think that if the office of Lord Clerk-Register is to be retained in any shape, it would be doing great violence to its history to strip it of the duties which give the title and office all their meaning, and which must be performed by somebody.

The second consideration to which the Committee would draw attention is the fact already mentioned, that the question was deliberately considered by a Select Committee so recently as 1866. After taking evidence, they came to an emphatic conclusion, which was indorsed by Parliament. And when Lord Camperdown's Commission sat, no complaint was made with regard to the conduct of this office, and no suggestion was brought forward that it was unnecessary. It is difficult to see what circumstances can have arisen in the interval leading to the conclusion that this officer should be deprived of his salary and duties, especially as the department, which even in 1866 was yielding a surplus revenue to the public exchequer of £4000 or £5000, came, under the management of the late Lord Clerk-Register, to yield a surplus of £10,500 in 1874, and the surplus is understood to be still increasing.

The history of the office, and the recent settlement of the question, thus both point to the conclusion that if there is a necessity for economy, and if the Deputy Clerk-Register is really another head, the reduction should be made in the subordinate and not in the higher office. It has been said that an objection to the retention of the Lord Clerk-Register, as working head of the office, is that £1200 is an inadequate salary for so high an officer. The difficulty has not yet been experienced, but if it should be, the Committee think that the remedy might lie in the increase of the salary of the head of this important and lucrative department. It is understood that the salary of the head of the Land Register in England is £2500.

The English Land Register is meantime an experimental institution, and has done little or nothing to justify its existence. The

Scottish Register House, as is well known, provides a real and accurate series of registration titles for every acre of land and every house in Scotland, and it is not too much to say that the security of the titles to landed property in Scotland depends upon its efficiency. It is impossible that such an establishment can be effectively administered or supervised by a Board in London; and the Committee only express what must be the opinion of every person conversant with our system of property law, that the head of this establishment ought to be resident on the spot, and should give a considerable share of his time and personal attention to the duties of the office.

Under the Bill the head of the department will be one of the principal Secretaries of State, practically the Home Secretary; and the patronage of the subordinate offices will be removed to London. The communications of the different branches of the office with the head will have to be conducted by correspondence, instead of personally as heretofore. The Committee have reason to believe that this will be very inconvenient. The personal exertions of the late Lord Clerk-Register in the administration and development of his department were of signal benefit. To them we owe the rendering of the valuable old records of Scotland readily accessible for literary purposes; and also the organizing, under the sanction of the Treasury, of a series of Record publications, in continuation of those issued under a former Lord Clerk-Register, and of a similar description to the English series issued under the superintendence of the Master of the Rolls. The Home Secretary cannot be expected to take the same strong personal interest in the office as a permanent official such as the Lord Clerk-Register.

The Committee are therefore of opinion that there should be a resident head of the Register House, and that that head should be the Lord Clerk-Register.

D. CRAWFORD, *Convener*.

The "Heathen Chinese" and Naturalization.—A curious case was disposed of a short time ago in the Californian Circuit Court, which deserves mention, involving as it does serious international interests. Ah Yup, a native and citizen of the Empire of China, presented a petition praying to be admitted a citizen of the United States. There was no question that, provided the American law authorized the naturalization of a Mongolian, he possessed all the other necessary qualifications. The language of all the Acts of Congress relating to the subject has been "that any alien, *being a free white person*, may be permitted to become an American citizen, and in 1870 the naturalization laws were extended to "aliens of African nativity, and to persons of African descent." Two questions then presented themselves to the Court: 1st, Whether the term "white person" in the statute included Mongolians? and 2nd, If the provisions of the Act excluded all but white persons, and persons of African nativity or descent? The judge in his

opinion enters largely into the classification of the various races of mankind, quoting Buffon, Linnæus, and other authorities, but comes to the conclusion that "none of those classifications, recognising colour as one of the distinguishing characteristics, include the Mongolian in the white or whitish race." What appears, however, to have weighed with the learned judge more than anything else is the report of a debate in Congress in 1870, when the naturalization laws were extended to negroes. At that time the great Chinese problem was forcing itself more and more on the attention of the authorities. Senator Sumner moved that the word "white" should be struck out, but his views were too liberal, and the jealousy of the Chinese was too great, for his ideas to find acceptance in the assembly. There is no doubt, then, that in 1870 Congress retained the words "white person" with the deliberate intention of excluding Mongolians from the privileges of naturalization; and acting on this view, the judge refused the unfortunate Ah Yup's petition.

It is impossible for us to speak with any authority on the great question of Chinese labour and immigration in America; but we cannot help thinking that by retaining the word "white" in the statute Congress did not carry out the original spirit of the Act. There is little doubt that when the Act was originally passed in 1802, the expression "any alien, being a free white person," was intended to embrace all except negroes; and when the latter were admitted in 1870, the broad distinction between "white" and "black" being done away with, all intermediate shades of colour should have been admitted, *under that Act*, to the privileges of naturalization. Of course if Congress were determined that the Chinese should not enjoy these privileges, a special Act to that effect would have been passed. As it is, however, the decision we have referred to is worthy of note, and the European nations will watch with interest the action of the American Government in reference to what promises to become one of the most important questions of the century.

The Bye-Laws of Railway Companies.—It has been more than once hinted of late by persons high in office that the relations between railway companies and the public must sooner or later be considered by Parliament as a whole. When the question comes up for discussion, we hope that the present powers of the companies to make bye-laws will not be overlooked. The case of *Bentham v. Hoyle* (26 W. R. 314, L. R. 3 Q. B. D. 289) curiously illustrates the present difficulties of the situation in the matter of bye-laws. It is common enough for offenders to be brought up in the police courts for being guilty of the dishonest trick of eluding payment of fare. But it is plain that in the hurry of railway travelling many persons of undoubted respectability must frequently find themselves in a railway carriage without a ticket, and

such persons are in this predicament. The Act of Parliament which applies to their case (the Railway Clauses Consolidation Act, 8 Vict. c. 20) provides the penalty of 40s. in the case of *an intent to avoid payment of fare*. The bye-laws of the companies provide the same and a further penalty, but do not make the fraudulent intention so much an element of the offence. In numerous cases, of which *Dearden v. Townsend* (L. R. 1 Q. B. 10) is the best known, the meaning of such a bye-law has been considered. Dicta are conflicting, but both *Dearden v. Townsend* and *Bentham v. Hoyle* seem to be express decisions that without fraud there is no punishable offence at all. We propose shortly to examine the statute and the bye-laws by the light of the judgment in *Bentham v. Hoyle*, which we may remark differs from *Dearden v. Townsend* in having arisen under a differently worded bye-law. The "model code" of bye-laws now in force is of comparatively recent date.

By section 103 of the Railways Clauses Act, 1845, "if any person travel . . . without having previously paid his fare, and with intent to avoid payment thereof, . . . every such person shall, for every such offence, forfeit to the company a sum not exceeding forty shillings." By sections 108 and 109, read together with 3 and 4 Vict. c. 97, ss. 8, 9, all railway companies may make bye-laws for regulating travelling upon their railways, which bye-laws must be submitted to the Board of Trade before confirmation, before they have any force, and must not—this latter provision is, of course, in affirmance of the common law—"be repugnant to the laws of that part of the United Kingdom where the same are to have effect." "Any person," it is added, "offending against any such bye-law shall forfeit for every such offence any sum not exceeding five pounds, to be imposed by the company in such bye-laws as a penalty for every such offence." It remains to state the bye-law. It runs thus:—

"Any person travelling without the special permission of some duly-authorized servant of the company, in a carriage or by a train of a superior class to that for which his ticket was issued, is hereby subject to a penalty not exceeding forty shillings, and shall, in addition, be liable to pay his fare according to the class of carriage in which he is travelling from the station where the train originally started, unless he shows that he had no intention to defraud."

The facts were simply that Mr. Bentham was convicted in a penalty of 10s. under this bye-law for travelling in a first-class carriage with only a second-class ticket, but it was found as a fact that he had no intention to defraud. The judgment of the Court (Cockburn, C.-J., and Manisty, J.) was that the conviction must be quashed. The Lord Chief-Justice—who happens to have been a member of the Court which decided *Dearden v. Townsend*—said that the words, "unless he shows that he has no intention to defraud" might, in point of grammar, apply either to the whole of

the bye-law, or only to the latter part of it, which imposes the obligation to pay "whole fare." If they applied to the whole, the conviction was clearly bad on the construction of the bye-law itself, inasmuch as absence of fraud had been found as a fact. If on the other hand—as the learned judge inclined to think—the words applied to the latter part of the bye-law only, the bye-law was unreasonable, chiefly on the ground that "there must be, in point of reason, a *mens rea* to warrant charging people with offences and convicting them on such charges, in addition to the offences under the Act of Parliament." Mr. Justice Manisty, though not having the doubt as to the construction, thought it "beyond all doubt unreasonable."

We have very little doubt that this decision is right, but it is curious to observe that neither the early case of *Chilton v. London and Croydon Railway Company* (16 M. & W. 212), nor the later Irish case of *Barry v. Midland Great Western Railway Company* (17 Ir. C. L. 103), nor the very recent case of *Brown v. Great Eastern Railway Company* (25 W. R. 792, L. R. 2 Q. B. D. 406) was cited in the course of the argument, *Dearden v. Townsend*, being, in fact, the only case referred to. Each of these cases contains some sort of intimation from at least some members of the Court in favour of a similar bye-law, though in none of these cases was it necessary to decide the express question whether such a bye-law was reasonable or not.—*Solicitors' Journal*

Society of S.S.C.—At a meeting of this Society, held on the 4th ult., the following office-bearers were elected: *President*, Mr. David Dove; *Vice-President*, Mr. P. S. Beveridge; *Librarian*, Mr. J. Henry; *Treasurer*, Mr. Ebenezer Mill; *Collector of Widows' Fund*, Mr. Charles Henderson; *Secretary*, Mr. Ellison Ross; *Councillors*, Messrs. Drummond, Cornillon, Lockhart, Thomson, Nicolson, Rodger, Ritchie, and W. Burness.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF LANARKSHIRE.

Sheriffs GUTHRIE and CLARK.

HARBISON v. ROBB.

"*Glasgow, 29th December 1877.*—Declares the proof closed, and having heard parties' procurators and made avizandum: Finds that the pursuer was injured on the head through the falling of some plaster on 8th April last from the roof of the house in Commercial Road, South Side, Glasgow, of which the defender is the proprietor, and he is tenant: Finds that he has failed to prove facts and circumstances inferring liability on the part of the defender to pay him damages: Therefore sustains the defences, and assoilzies the defender from the prayers of the petition: Finds him entitled to expenses, allows an account thereof to be lodged, and remits to the auditor to tax and report, and decerns. W. GUTHRIE.

"*Note.*—In this action the pursuer, a hawker, residing in a house in Commercial Road, South Side, Glasgow, rented at £8 a year, claims from his landlord £200 as compensation for injuries sustained by him on Sunday evening

8th April last, by the fall of part of the plaster of the ceiling of his house. He avers that the accident was due to an inherent defect, or insufficient workmanship, or negligence on the part of the defender, who, he says, had been warned of the insecure state of the ceiling. There is, however, no evidence that any such warning was given within the preceding two years; and it appears that the only notice spoken to was given in the summer of 1875, when the ceiling in that tenement had been injured by water, and that at that time the warning was attended to, and this as well as the other plaster-work of the tenement put in a state of repair. No evidence is offered to show that the repairs then made were insufficient, or that any insufficiency in the workmanship of the ceiling or roof was detected at the time of the accident. In short, the pursuer, apart from the intimation given and attended to two years ago, has not attempted to prove any definite fault whatever on the part of the landlord.

"The defender on his side pleads, *inter alia*, that the accident was caused by a quarrel and commotion and dancing in the house above the pursuer on the night before the accident. The pursuer denies that there was any such commotion on that night, and has adduced various witnesses residing on the stair, who also distinctly deny that there was any such thing. I am of opinion, however, notwithstanding these witnesses, that the witnesses for the defender are rather to be believed, who speak with at least equal clearness to the contrary, saying that there was a very great disturbance on that Saturday night, by which the house was very much shaken.

"Assuming that this disturbance took place, and that it was the immediate cause of the fall of the ceiling, its relevancy as defence in the present case may well be doubted. For in the view which I take of the evidence, the pursuer's case must either rest on the ground that the very occurrence of the accident is sufficient proof of a defect in the building for which the defender is responsible, or on an implied warranty by the defender as lessor against all latent defects. In either case an obligation of the lessor is presupposed, from which nothing that took place on the Saturday night can liberate him. However the matter is looked at, a house ought to be sufficiently strong to resist the concussion caused by such a commotion which was not of an abnormal or extraordinary character for such a locality. With regard to this matter the case is precisely parallel to that of *Reid v. Baird*, December 13, 1876, 4 Rettie 234, quoted for the pursuer, in which the Lord Justice-Clerk said: 'The defence is that the damage (arising from flooding from a badly-constructed lead gutter on a roof) was caused by an unusual and exceptional snowstorm, and no doubt that seems to have been the case; but still snowstorms must be calculated on in building houses in this climate, and it cannot be said that a house is properly built if it will not resist even an exceptional snowstorm.' So I think it cannot be said that a house is properly built if it will not resist an exceptional row or dance. And here there was not apparently anything very exceptional about the disturbance.

"This case is distinguished from *Reid v. Baird* by the absence of proof of any obvious or ascertained cause of the damage, such as the malconstruction of the gutter which was there. The pursuer has not proved any definite structural defect, or fault of workmanship, or want of due care by the landlord, to which it was due. He must, therefore, as I have said, rely on the accident itself as inferring *culpa*, or he must show in point of law that the location of a house implies liability in damages for latent defects. The latter question is novel so far as I am aware, and both questions are not without difficulty. With regard to the former, it has been said that fault may be inferred from the mere occurrence of an accident, as where a stone falls from a railway arch and injures a passenger on a road passing under the railway, or a passenger on the street is injured by those who are lowering casks from a warehouse to a lorry by means of a crane, the rope of which breaks. In both these cases the passenger is on a public way, where he is entitled to rely on ordinary security to life and limb. The railway company can by proper inspection guard against the falling of loose stones from its bridges, and the warehousemen may be held

bound in using the crane to take the utmost care that passers-by are safe. There is a difference in such a case as this. The tenant occupies the house year after year; he sees it constantly, is far more familiar with its condition and appearance than the landlord, and yet he makes no complaint, indeed, detects no flaw or defect for two years. There is no duty of inspection on the landlord which he is shown to have neglected; indeed, it would be considered troublesome if landlords were always examining into the condition of their houses, and in ordinary life tenants are understood to be quite ready to give notice when anything appears to be going wrong. Hence it is that in questions of this kind so much is held to depend on timely notice by the tenant of the nature of the injury or detriment for which he makes a claim. (See *Hunter on Landlord and Tenant*, ii. 457, *et al.* last edition; *Lounde v. Buchanan*, 17th Nov. 1854, 17 D. 63, and similar cases.) I think, therefore, that *culpa* cannot in this case be fairly inferred merely from the fact that the ceiling did fall. The question remains whether, assuming, as I think it must be assumed, that the plaster-work fell from some latent defect, the landlord is liable in damages for all the direct consequences. The considerations just adverted to tend to show the inexpediency of such a rule, and the analogy of the law of sale (to which the contract of location is assimilated in many respects both by Roman and Scottish jurists) is also against it under the Scottish law of sale. Before 1856 there was, indeed, an implied warranty against latent defects; but it extended only to the return of the article sold, or the repayment of the price if the article sold had perished from the latent defect (*Bell's Prin.*, 97). So in location. A landlord clearly cannot claim rent if the tenant, by some such defect, is deprived of the use and possession of the subject of the lease; but it is a further and difficult question whether he is to pay damages for loss arising therefrom. Since 1856 the law has been that no warranty of quality or sufficiency is implied in sales of goods unless the seller knew at the time of the sale that the goods sold were defective, or of bad quality, or the goods were sold for a specific purpose. A house is let for the purpose of habitation, and, it may be said, cannot be fit for that unless it is safe from such accidents as the fall of a ceiling; and accordingly it is said, 'From the nature of the contract, warrandice is implied on the landlord's part to make the subject effectual to the tenant or fit for its purpose,' and so to put the house in due repair (*Bell's Prin.*, 1253). But the result of his failure to do so is not, so far as our books show, that he is liable in all damages ensuing, but only that the rent must be remitted or abated in proportion to the period for which the lessee is deprived of the enjoyment of the subject let (*Dig. xix. 2, T. 33, T. 15, s. 7, et al.*; *Ersk. Prin.*, ii. 6, 17; *Inst. II. 6, 39, 43*; *Bell's Prin.*, etc., and authorities there cited). Out of the many cases in which this principle has been appealed to, I am not able to find one in which it has been held to give rise to a claim for damages for a latent defect such as this. The absence of such authority is in itself a consideration of some weight against the pursuer.

"I should hesitate, however, to affirm that no case can occur in which a landlord will be liable for the damages naturally resulting from a latent defect in a house let to a tenant. Whether he is so or not appears to be to some extent a question of circumstances. It depends on the nature of the subject let, and the character of the defect for the warrandice, which his contract infers against him, is not an absolute warrandice against latent defects, but only, apart from questions of good faith, against such defects as destroy or materially impair the tenant's use and possession. The matter is illustrated by Ulpian in two cases which he puts (*Dig. xix. 2, 19, s. 1, loc. cond.*): 'Si quis dolia vitiosa ignarus locaverit, deinde vinum effluxerit, tenebitur in id quod interest; nec ignorantia ejus erit excusata; et ita Cassius scripsit, Aliter atque se saltum pascuum locaste, in quo herba mala nascebatur; hic enim si pecora sunt, vel etiam deteriora facta, quod interest prestabitur, si scisti; si ignorasti, pensionem non petes; et ita Servio, Labeoni, Sabino placuit.' The reason of the distinction is explained by Noodt (*Opp. T. ii.*

426, ed. 1724; comp. Pothier W. de Bail a Reute, s. 32, W. D. s. 12) to be that the locator hires out the cask for a special purpose, i.e. for holding wine; and if it turns out to be unfit for that purpose, he is liable in full damages if he knew of its unfitness, '*quæ dolus est*;' if he did not know, because he is to blame for hiring out as sufficient a cask which could not serve the purpose intended, and he must in good faith make good the damage arising from its not being what he represented. On the other hand, the lessor of a grazing farm does not affirm that it is (far) free from deleterious plants; he may, in good faith, be ignorant of their existence. Moreover, their growth does not necessarily and entirely destroy the fitness of the farm for its intended use. Reference may also be made to Voet's explanations of this much-controverted passage, Com. xix. 2, 14, fm., and to the copious commentary of the greatest of the modern civilians, Dunellus, Com. xiii. c. 7, secs. 15, 18, 23; cf. Warnkoeing, Com. iii. 261.

"Now this case seems to have more analogy to the letting of the grazing farm where there are some noxious weeds than to the hiring out of the rotten vats. The latter were totally unfit for their purpose, and naturally are applied to the intended use in reliance on the representations of the lender, who, as Voet suggests, was probably, in the case put, the artisan who made them; but in the letting of a farm or a house the lessee relies on his own examination. His eye is his merchant, as it were, even more than in the ordinary case of the sale of goods. In this case the house has been inhabited by the pursuer for years without any objection or loss except that arising from this unexpected and probably unavoidable accident. It has not been found unfit for its purpose in consequence of the latent fault which has had such an unfortunate result. The flaw is not one which either infers bad faith on the part of the lessor, or a radical and total unfitness of the subject for the purpose for which it was let. In coming to this conclusion, I am quite aware that some considerations may be urged on the other side—and I certainly do not think it desirable, especially in so rapidly-growing a city as this, to diminish in any degree the responsibility of landlords for the safety and comfort of their tenants; but looking to such authorities as we have, and to the principles which according to all the authorities obtained in regard to this matter, I can only regard this as one of the hazards which the tenant of a house takes upon himself, and which gives him a claim against the lessor only so far as it has interfered with his use and enjoyment of the subject let. W. G."

On appeal the Sheriff-Principal adhered *simpliciter*.

Act.—Clark.—Alt.—MacLachlan.

SHERIFF COURT OF PERTHSHIRE

Sheriff BARCLAY.

A. v. B.

A widower, under written agreement, placed a young child in the custody of a friend, to be brought up by him for a term of years without remuneration. The father, being displeased with the upbringing of his child, brought an action for delivery of the child, and the custodier a counter-action for the aliment of the child, because of breach of contract before the term of years had expired. The custodier pled that the action for delivery of the child was incompetent in the Sheriff Court. The following interlocutor was pronounced:—

"Having heard parties' procurators on the preliminary pleas, and made *avizandum* therewith: In respect that it is admitted by the defender that the child whose custody is sought by the pursuer is his lawful child, and that the defender claims the custody under a civil contract, Repels the first two preliminary pleas, and reserves consideration of the third until the Record be closed, and orders the case to the Roll of next Court, that the Record may be adjusted and closed.

HUGH BARCLAY.

Note.—In a question between parents of legitimate, and even in some circumstances of illegitimate children, as to their future custody, that question is privative to the Court of Session as one of equity, and where it is judged of by what is best for the interests of the children. But it never was doubted that the Sheriff has jurisdiction to decide all questions of custody between the parents, whose right of custody is constituted by *nature*, against strangers who had no such right, but one solely resting on *civil contract*. H. B."

On an appeal, Sheriff Lee, on 18th February, affirmed the interlocutor, adding the following note:—

Note.—In this case it is admitted that the present state of matters as regards the custody of the child in question stands upon the agreement No. 5 of process. But it was not contended at the debate, and in the Sheriff's opinion it cannot be maintained, that such an agreement is irrevocable. The natural obligations incumbent on the father towards his pupil child cannot be discharged by the father at his own will, and in the opinion of the Sheriff the pursuer's obligations towards the child in question, and the rights flowing therefrom, must be regarded as still in force. Any claim on the part of the defender to have the pursuer treated as having forfeited his right of guardianship can only be maintained in the Court of Session, to which alone, as a Supreme Court of Equity, the father is subject in directing the education and regulating the management of his child. It does not at all follow from the fact that in this case the custody of the child has for some time past been exercised by the defender under the agreement referred to on record, that the father's claim to resume his exercise of the parental duties is liable to be met in the Sheriff Court by an allegation that he is unfit to be trusted with the discharge of these duties, and in the present case the Sheriff does not find on record any distinct allegation against the pursuer's fitness. On the whole, he thinks it unnecessary at present to say more than that the case as it stands is not one in which the Sheriff can refuse to exercise jurisdiction at the instance of the father, and to the effect of enabling him to discharge his parental duties. R. L."

Notes of English, American, and Colonial Cases.

RAILWAY AND CANAL TRAFFIC ACT.—*Conditions limiting liability of company for damage—Just and reasonable—Alternative rate of charge—Wilful misconduct of servants of company.*—Defendants charge two rates for the conveyance of certain articles—one the ordinary parliamentary rate, when they take the ordinary liability of the carrier, and the other a reduced rate, in which case they make it a condition of carriage that the sender relieves them of all liability for loss or damage, except upon proof that such loss or damage arose from wilful misconduct on the part of the company's servants:—*Held*, that under these circumstances, the condition relieving the company when goods are carried at the lower rate is "just and reasonable," within section 7 of the Railway and Canal Traffic Act, 1854, 17 & 18 Vict. c. 31 (*Lewis v. Great Western Railway Co.* App. 47 L. J. Rep. Q.B. 131). The plaintiff's agent sent cheeses, one of the articles conveyed at the lower rate, from London to Shrewsbury. The cheeses were improperly packed into the train by the company's servants in London, and in consequence arrived at Shrewsbury in a greatly damaged condition:—*Held*, that though there was clear evidence that the cheeses had been in fact improperly packed, yet, as there was none to show either that the packers knew that they were packing them in a manner likely to damage them, or that it had been brought to their knowledge that that mode of packing might lead to such damage, and that they had then packed the cheeses in that mode, careless whether it would result in such damage or not, there was no evidence of wilful misconduct on their part, so as to render the defendants liable.—*Ibid*.

LICENSE.—*Keeping a dog without—License subsequently obtained on the same day—Fraction of a day.*—By 30 Vict. c. 5, s. 8, "If any person keep a dog without having in force a license granted under this Act, authorizing him so to do, he shall forfeit the sum of five pounds." By section 5, "Every license shall commence on the day on which the same shall be granted, and shall terminate on the 31st December following." The license, which is issued under section 5, purports to be "from" the date thereof until the 31st December. An excise officer called at respondent's house, and seeing there a dog for which a license ought to have been taken out under section 5, preferred an information under section 8, to answer which the respondent was summoned, before a magistrate. At the hearing of the summons the respondent produced a license which he had taken out half an hour after the officer had called, and contended that such license was an answer to the information, as the law would not consider the fraction of a day :—*Held*, that as the offence was alleged to have been committed the same day as the license was taken out, the Court could, consistently with sections 5 and 8, look at the order of events; and consequently the offence which had already been committed could not be purged by a license subsequently taken out. And, further, that the form of the license was not inconsistent with section 5.—*Campbell v. Strangeways*, 47 L. J. Rep. M. C. 6.

RAILWAY COMPANY.—*Bye-law—Passenger travelling without ticket.*—A bye-law was made by a railway company under the powers of 8 & 9 Vict. c. 20, in the terms following :—"All passengers travelling without the special permission of some duly authorized servant to the company in a carriage or by a train of a superior class to that for which his ticket was issued, is hereby subject to a penalty not exceeding 40s., and shall, in addition, be liable to pay his fare according to the class of carriage in which he is travelling from the station where the train originally started, unless he shows that he had no intention to defraud." The appellant was convicted under the above bye-law of travelling in a first-class carriage between S. & B. with a second-class ticket. The justices found, as a fact, that he had no intention to defraud :—*Held*, that the conviction was wrong, and that in order to constitute an offence under the bye-law an intention to defraud must exist, inasmuch as otherwise the bye-law itself would be unreasonable, and repugnant to the provisions of 8 & 9 Vict. c. 20. *Bentham v. Hoyle*, 47 L. J. Rep. M.C. 51.¹

WILL.—*Ademption of specific legacy—Change of Investment of fund bequeathed.*—Testator bequeathed £1000 D stock of the London and North-Western Railway Company, then standing in the names of the trustees of his marriage settlement, and which had been bequeathed to him by his late wife under a power enabling her so to do, contained in the marriage settlement (and which stock it was his intention to have transferred into his name as soon as conveniently could be done) to H. if he should be living at the testator's death. The D stock was redeemed and paid off at par in the life of testator, and reinvested in the names of the trustees in Lancashire and Yorkshire preference shares, and a cheque for £8, 18s. the balance, was sent to the testator, but was not cashed by him :—*Held*, that the Lancashire and Yorkshire shares and the £8, 18s. did not pass to H.—*Le Grice v. Finch* (3 Mer. 50) and *Clark v. Browne* (2 Sm. & G. 524) disapproved.—*Harrison v. Jackson*, 47 L. J. Rep. Ch. 142.

COMPANY.—*Prospectus—Omission of contract—Statutable fraud.*—A., a promoter of a joint-stock tramway company intended to be formed, entered into a contract with B., another promoter of such company, by which the latter, in consideration of A. obtaining for him the contract from the intended company for making the tramway on terms satisfactory to him, agreed to pay A. a large sum of money out of what he should receive from such company under the contract. B. also entered into a contract with C., who had obtained a concession from a foreign Government necessary for allowing the tramway to be made, and who afterwards became a director of the company, and by this contract B. was to give C. a large sum for such concession, but the contract was

¹ See Journal of Jurisprudence, ante, p. 381.

to be void in the event of B. failing to obtain from the intended company the contract for the construction of the tramway :—*Held* by the Common Pleas Division, that both the contract between A. and B., and the contract between B. and C., were within section 38 of the Companies Act, 1867 (30 & 31 Vict. c., 131), and therefore were required to be mentioned in the prospectus of the company which A. and B. issued ; and that their omission gave a right of action against A. and B. to a shareholder who took shares in the company on the faith of such prospectus, and in ignorance of the existence of such contracts, and that notwithstanding A. and B. when they issued such prospectus *bona fide* believed that the contracts need not by law have been set forth (*Twycross v. Grant*, App., 46 L. J. Rep. C. P. 636.) *Held* also, that the prospectus was issued by the promoters as promoters, within the meaning of the statute, notwithstanding they issued it after the company had been registered, and after the prospectus had been settled by the board of directors. (*Ibid.*) On appeal, *Held*, by COCKBURN, C.-J., and BRETT, L.-J. (*dissentibus*, KELLY C.-B., and BRAMWELL, L.-J.), affirming the decision of the Court below, that it was rightly left to the jury to say whether the contracts were material to the interests of the company, and material to be made known to the shareholders ; and that these questions having been found in favour of the plaintiff, the case was within the 38th section.—*Ibid.*

DISSOLUTION OF MARRIAGE.—*Domicile*—*Marriage between foreigners in England*—*Papal dispensation*—*Lex loci contractus*.—The personal capacity of parties to enter into the contract of marriage depends upon their domicile, and where both parties had a foreign domicile, and, by the law of their domicile, their marriage was invalid by reason of consanguinity, a marriage which was contracted in England, and which would have been valid according to English law, was held invalid.—*Sottomayor (otherwise De Barros) v. De Barros* (App.), 47 L. J. Rep. P. D. & A. 23. Two Portuguese subjects, whose domicile was Portugal, and whose marriage in Portugal would have been invalid without a papal dispensation, on the ground of consanguinity, they being first cousins, contracted in 1866 a marriage in England. At that time they were of the respective ages of sixteen and fourteen, and the petitioner, the lady, alleged that her marriage was entered into under pressure, and only with the purpose of saving some of her father's property from the consequences of a bankruptcy. The marriage was never consummated. In 1874 a petition to have the marriage declared void was presented by the lady :—*Held* (reversing the decision of the Judge of the Divorce Court), that the marriage being invalid according to the law of the country of domicile of the parties, must be declared null and void here.—*Simonin v. Mallac* (2 Sw. & Tr. 67) distinguished.—*Ibid.*

TRADE NAME.—*Injunction*—*Misrepresentation*.—An article, the secret making of which was known only to one maker, had acquired a trade name. An injunction was granted, restraining the application of that name to a different article of the same class, so as to induce the belief that it was plaintiff's article.—*Siegert v. Findlater*, 47 L. J. Rep. Ch. 233.

CARRIER.—*Liability of an insurer for passenger's luggage*—*Negligence*.—Railway companies are not insurers of that portion of a passenger's luggage which is, at his request or with his consent, placed in the same carriage in which he travels or is about to travel ; but they are liable for loss or injury to it caused by their negligence.—*Bergheim v. Great Eastern Rail. Co.* (App.), 47 L. J. Rep. C. P. 318.

SHIP AND SHIPPING.—*Stranding of ship where no damage*—*Jurisdiction of wreck commissioner*—*Suspension of master's certificate*.—The jurisdiction to suspend the certificate of the master of a ship has not been extended by the Merchant Shipping Act, 1876 (39 & 40 Vict. c. 80), sections 29 and 32, to cases not within sections 242 and 432 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), and therefore where an inquiry into the stranding of a ship

where no damage has been done is held by a wreck commissioner under section 32 of the later Act, he has no jurisdiction upon such inquiry to suspend the certificate of the master of the stranded ship.—*Ex parte Storey*, 47 L. J. Rep. Q. B. 266.

HARBOURS, &c., CLAUSES ACT.—*Damage to pier by derelict vessel—Owner's liability—Act of God.*—Section 74 of the Harbours, Docks, and Piers Act, 1847, enacts that "the owner of every vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock, or pier, or the quays or works connected therewith; and the master or person having the charge of such vessel or float of timber, through whose wilful act or negligence any such damage is done, shall also be liable to make good the same. . . . Provided always that nothing herein contained shall extend to impose any liability" upon the owner when the vessel is at the time when the damage is caused in charge of a compulsory pilot. A vessel was driven aground by a violent storm, and after the master and crew had been obliged to abandon her, was forced by the wind and waves against a pier, whereby serious damage was occasioned :—*Held* by the majority of their Lordships (affirming the decision of the Court of Appeal), that the owners of the ship were not liable under the above section.—*River Weir Commissioners v. Adamson* (H.L.), 47 L. J. Rep. Q. B. 193. The exemption from obligation to make good losses or injuries caused by the "act of God" applies to liabilities created by section 74 no less than to those existing before the passing of the Act.—*Ibid.*

VENDOR AND PURCHASER.—*Condition—Approval of solicitor—Rescission.*—A sale made subject to the approval of purchaser's solicitor enables the purchaser to rescind for a reasonable cause.—*Hudson v. Buck*, 47 L. J. Rep. Ch. 247. A sale of a leasehold house was subject to approval of the purchaser's solicitor. The house and another were included in one lease, at one rent, and subject to restrictive covenants as to the whole :—*Held*, that (the vendor not having proved that he could obtain an apportionment of the rent and covenants) the purchaser could rescind.—*Ibid.*

NEGLIGENCE.—*Evidence—Question for jury.*—While respondent was travelling on the appellants' railway in a carriage all the seats of which were occupied, three more persons got in and remained standing until the train arrived at the next station, where there was a crowd of persons, some of whom tried to enter the carriage just as the train was starting; respondent rose from his seat and tried to prevent any more passengers from getting in. After the train had started respondent fell forward, and put his hand on one of the hinges of the door to save himself; at the same moment a porter pushed away the persons who were trying to get in, and slammed the door, crushing the thumb of respondent, who brought an action for the injury so caused :—*Held*, reversing the decision of the Court of Appeal, that there was no evidence of negligence proper to be left to the jury.—*Metropolitan Railway Co. v. Jackson* (H.L.) 47 L. J. Rep. C. P. In actions for negligence the rule is that from any given state of facts the judge must say whether negligence can legitimately be inferred, and the jury must say whether it ought to be inferred. The case of *Bridges v. The North London Railway Company* (42 L. J. Rep. Q. B. 151; s. c. L. Rep. 7 E. & I. App. 213) lays down no new principle of law on the subject.—*Ibid.*

DEFAMATION.—*Privilege—Report of ex parte proceedings before a magistrate in a police court—Jurisdiction.*—The rule that the publication of a fair and correct report of proceedings taking place in a public court of justice is privileged, extends to proceedings taking place publicly before a magistrate, though such proceedings consist of an *ex parte* application for a criminal summons, terminating in the refusal by the magistrate to proceed with the charge on the ground that on the facts stated he had no jurisdiction.—*Usill v. Hales*, 47 L. J. Rep. C. P. 323. Three men who had been employed by the plaintiff, a civil engineer, in

the construction of a railway, applied to a magistrate in open court for criminal process against plaintiff, alleging that, as they had not been paid their wages, while plaintiff had been paid, they considered he had been guilty of a criminal offence in withholding their money. The magistrate refused the summons, considering that he had no jurisdiction. Defendants afterwards published a report of the proceedings, which the jury found was a fair and correct report of what occurred:—*Held*, that the report was privileged.—*Ibid*.

PATENT.—Claim—Novelty—Prior publication.—The object of a claim is not to claim anything which is not mentioned in the specification, but to disclaim something which might otherwise be supposed to be claimed, and it must always be construed with reference to the whole context of the specification.—*Plimpton v. Spiller* (App.), 47 L. J. Rep. Ch. 211. A patentee of an improvement in skates in his specification described his invention as relating to an improvement in attaching the rollers or runners to the stock or footstand of a skate, whereby the rollers or runners were made to turn or cant by the rocking of the stock or footstand, so as to facilitate the turning of the skate on the ice or floor; and he described also a mode of making the skate applicable to ice by substituting flat runners for rollers, and a mode of securing the runners by clamping them between pairs of discs, the runners having smooth angular edges, so that they might be reversed when the inner edges lost their angularity by wear, and a fresh sharp edge obtained, and when both edges of one surface became worn, the runner might be inverted, and two more sharp edges obtained; and he claimed first applying rollers or runners to the stock or footstand of a skate as described, so that the rollers or runners might be clamped or turned so as to cause the skate to be moved in a curved line; and, secondly, the mode of securing the runners and making them reversible as above described:—*Held*, that the second part of the claim was to be read with reference only to the first part, and not as a substantive claim, and that the want of novelty in the second part of the claim did not invalidate the patent. Where the only substantial evidence of prior publication of an invention lay in the fact that a single copy of an American book had been presented to the Patents' Office library, where it had remained uncatalogued and unnoticed,—*Held*, that this did not amount to a prior publication.—*Ibid*.

CONTRIBUTORY.—Contract with promoter—Fully paid-up shares—Inconsistency between memorandum and articles.—A. agreed to sell the lease of a coal mine to I. for £24,000 in cash, and £42,000 in shares of a company to be established to take over the mine with a nominal capital of £200,000. A syndicate was formed to promote the company, and the company was formed and duly registered. The memorandum of association stated that the capital of the company was £200,000 in 20,000 shares of £10 each. The articles of association stated that 15,000 of the shares were to be considered as fully paid up, and belonged to the persons mentioned in the schedule to an agreement which it was intended should be executed immediately. Shortly after the registration of the company I. executed an agreement declaring himself a trustee for the company. A few days after that the agreement referred to in the articles was executed, and the 15,000 shares were thereby divided between A., who took 4200 in part payment for the property, and the other members of the syndicate or their nominees, who took them in consideration of their trouble in the formation of the company. This agreement was duly registered; no shares beyond the 15,000 were ever issued. A prospectus was then issued inviting the public to subscribe for £60,000 of debentures, paying interest at 10 per cent. per annum, the principal and interest to be secured on the whole property of the company, and stating that the agreement for the purchase of the property and the memorandum and articles of association could be seen at the offices of the solicitors of the company. A. purchased for value 3520 shares from members of the syndicate, to whom they had been allotted as fully paid up, in addition to the 4200 shares allotted to him in respect of the purchase-money. The

company was wound up, and the liquidator sought to put A. on the list of contributories in respect of these 3520 shares :—*Held* (reversing the decision of MALINS, V.C.), that the agreement allotting the 15,000 shares was made *bona fide* and for good consideration, and having been registered under section 25 of the Companies Act, 1867, and though not mentioned in the prospectus, yet not having been concealed from persons intending to become debenture holders, was a contract entitling the holders to be considered as holders of fully paid-up shares. *Held* also (reversing the decision of MALINS, V.C.), that the fact that the memorandum stated there were 20,000 shares, but did not say they were fully paid up, and the fact that the articles said that 15,000 shares were to be taken as paid up, did not create an inconsistency between the two documents.—*Crickmer's Case* (44 L. J. Rep. Ch. 595), distinguished.—*In re Wedgwood Coal and Iron Co.*—*Anderson's Case* (App.), 47 L. J. Rep. C. 273.

RAILWAY COMPANY.—*Undue preference*—*Reduction of charges*—*Gratuitous cartage*—*Parties having advantages afforded by rival lines.*—Plaintiff carried on business as a brewer at Burton, and employed defendants to convey goods for him by their railway. Plaintiff's premises were not connected with defendants' or any other line by sidings. Plaintiff was charged by defendants a station to station rate for the carriage of goods to and from Burton (which rate also included a charge for station accommodation), and 1s. a ton for cartage to and from the station. Three other firms at Burton had premises connected with a rival line, belonging to the Midland Railway Company, by sidings, from which all goods forwarded or received were loaded and unloaded. The cost of cartage was thus saved, and, in addition, the Midland allowed a rebate of 9d. per ton, a sum which fairly represented the value of the station accommodation and other services which were, in consequence of the sidings, not required to be performed by the Midland. Defendants, solely with a view to attract the traffic of the three firms from the Midland, carted goods for them gratuitously, and allowed a rebate of 9d. a ton off the station to station rate; the result being that plaintiff had to pay 1s. 9d. a ton more than the three firms for goods carried under the same circumstances :—*Held*, that the transaction amounted to a breach of section 90 of the Railway Clauses Consolidation Act, 1845, as being a reduction of charges in favour of the three firms, and of section 2 of the Railway and Canal Traffic Act, 1854, as being an undue preference of the three firms, and that plaintiff was entitled to recover back the 1s. 9d. a ton from defendants.—*Evershed v. The London and North-Western Railway Co.* (App.), 47 L. J. Rep. Q. B. 284.

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SERFDOM IN SCOTLAND.¹

THE learned librarian of Edinburgh University has published this *brochure* on a subject which has a peculiar interest for Scottish lawyers, and which some Scottish lawyers have done much to illustrate. Lord Hailes in his "Annals of Scotland;" Mr. Tytler in his well-known chapter on the Ancient State of Scotland; Mr. Cosmo Innes in his various books on Legal Antiquities and editions of Charters and Registers, have all made valuable contributions. Mr. Ross and Mr. Hunter have devoted chapters to the early history of the lease and land cultivation; but it is to a layman, Mr. E. W. Robertson, that we owe the most satisfactory account of the primitive conditions of land tenure in Scotland. In this paper we certainly do not propose to investigate a subject so extensive and so obscure. After one or two observations on Mr. Small's essay, we shall add a few notes on the condition of colliers and salters, which has always appeared to us to be one of the most interesting of the phenomena connected with the transition from the old to the modern order of industry.

Mr. Small's first proposition seems to be that absolute serfdom originally existed in Scotland. The evidence of this consists chiefly of the repeated occurrence of the "*cum nativis et eorum sequelis*" clause in the charters of the twelfth and thirteenth centuries, and the frequent grants which are made of "*homines proprii*" and their offspring. The Monastic Registers of the same period contain instances of judicial proceedings for the recovery of fugitives, sometimes described in Gaelic as *cumberlachs*, *cumherbes*, or *cumlaves*; and the Quoniam Attachiamenta gives the form of a brieve for such recovery. This form sets forth the ways in which it was possible to become a serf, viz. by birth, by surrender (as "*per anteriores crines capitis*"), and by continuing to render certain services for the possession of a piece of ground. Too much weight should not be given to the Quoniam Attachiamenta, which, at the very best, was merely the work of a private writer, and never in any way received any public sanction. Its threefold division of the servile origin

¹ On Serfdom in Scotland and its connection with the Early Church. By John Small, M.A., F.S.A., Scotland, 1878.

reminds one of Spelman's distinction between *nativi*, *bondi*, and *villani*. Nor does the statute of David I., "of a man fundyn withoutin lord," throw any light on the features of this early Scottish serfdom; nor the provision of the Quoniam Attachiamenta, that "it is leasum to ony man to sell his liberty, but gif he does he may never recover the same." Indeed, nothing accurate is known about the *nativi* or *neyfs* in general, or about the special classes of them called *drengs* and *seolocs*. We know that the taint was hereditary, for the monasteries kept careful stud-books of their serfs, and the issue is made the subject of conveyance as well as the existing serf, and the serf is conveyed apart from the land; we know that the claim for the body of a serf required to be made judicially, and to be supported by evidence; we know that residence for a year and a day in a burgh operated freedom from this servile condition, but we do not know what personal rights the serf had. According to the doubtful authority of the "Regiam Majestatem" he had some. As Craig says, speaking of the English villein: "Cum rex solus sit dominus vitæ et membrorum servi seu villani: nec minus puniatus qui villanum etiam suum occiderit, quam si alium subditum regni." He was free from capture during the peace of fairs. The carl or *rusticus* could in certain circumstances claim *kelchyn*, *cro*, and *galnes*. And according to one most important (if historical) chapter of the "Regiam Majestatem," iv. c. 29, *De septennio libertatis*, every "*nativus servus* who for seven years has remained upon land without claim made by his lord (*non calumpniatus neque forthaynatus sive demandatus*) shall be free from his "legancia" and to go where he pleases.

Mr. Small's next proposition is that during the fourteenth and fifteenth centuries there was a gradual liberation of the serfs. This was due partly to the wars with England, partly to the example set by the Church (to whom our pious kings made frequent grants of serfs) in manumitting them by charter, and partly to the development of the system of agricultural tenancy. There is very scanty evidence of manumission on the part of the Church which can be traced to any benevolent or religious principle. It is more likely that the second and third causes of freedom went hand in hand, and that the desire of the Church to secure the proper cultivation of her rich estate led her to admit the serfs to some of the advantages of free tenure. It was perhaps in this way that the class of husbandmen (always reckoned inferior to the *firmarys*) and the kindly tenants of kirk lands came into existence. Mr. Small suggests that the ancient system of *steelbo* (or *stuht*, the Anglo-Saxon *gebur*) was connected with this change. But the necessity of stocking a farm for a poor tenant would have been equally great whether the tenant was a freeman or a slave. One practical point, noticed by Mr. Innes, is that there is no trace of any judicial proceeding to recover the body of a slave later than the year 1364; and, significantly enough, this case in the Sheriff Court at Banff was at the instance of the Bishop for the recovery of his "born thralls and liege men." Mr. Small quotes conveyances of a later date, containing the usual

clause of style, "nativis et eorum sequelis." But it would be obviously unsafe to argue from the well-known persistency of conveyancing technicalities to the actual existence of serfs. Many of these clauses merely mean that if such things exist, they are conveyed. With this emancipation of serfs it is impossible not to connect the condition of Scottish society which called for the "Statutes of Beggars," extending through the 15th and 16th centuries, and which at last, at the close of the 17th, drove Fletcher of Saltoun to the despairing suggestion of a return to a general system of slavery. It must be kept in view that the Scottish Poor Law did not provide so stringent a parochial test as was done in England, where in fact the labourers may be said to have been "adscripti parochiæ" by the provisions of the Statute of Elizabeth.

We now pass from Mr. Small's valuable summary of evidence on the history of serfdom, and proceed to the subject of the statutory restriction of colliers and salters, which does not seem to be organically connected with the early serfdom. It has been said that the earliest mention of coal in Scottish documents is that in a charter of Pittencrieff in the thirteenth century. But even before this the monks of Newbattle were digging their rude surface pits, and the monks of Dunfermline were disputing about the levels at Inveresk.¹ The mineral came but slowly into general use. In 1425 a public meter of coal was appointed by statute. The story of Æneas Sylvius about the black stones given to the poor belongs to the reign of James II. The Act of James VI. (1592, c. 148) shows that the law regarded coal-heughs with a peculiar favour, for it declares that those ungodly persons who, on private revenge and despite, set fire to coal-heughs shall be held guilty of treason. Sir George Mackenzie² mentions that the capital sentence under this statute was carried out in the case of John Henry, June 14, 1615.³ He further explains the reason of the law to be "founded on the favourableness of that manufactory, which some do ruin by putting fire in them, which is so easy that nothing could defend against it but the severity of such a law as this, and upon the greatness of the hazard which did arise by such fires as this, which could never be quenched when once kindled." The modern mind can scarcely conceive such wickedness as the attempt to fire a mine implies. Apart from the immediate distress and danger, it might well be called a treason against the human race, whose coal supplies are said to be in a precarious condition. Sir George Mackenzie also mentions (*loc. cit.*) that he had been consulted on the question whether the flooding or "drowning" of coal-heughs might be charged as treason under the Act 1592, to which he returned the very sound answer that penal statutes ought not to be extended beyond their expressed meaning

¹ See Grant of a Coal Mine to the Monks of Newbattle by Seyer de Quinci (1210-1219), printed in Mr. Cochran-Patrick's "Early Records of Mining in Scotland. 1878."

² Works, ii. 83.

³ Pitcairn's Crim. Trials, iii. p. 361. Henry's head was put on a pole at the pit-mouth.

by reasoning from similar consequences, adding, what is not so true in these days of exhausted seams, that the danger from water was not so great as that from fire. The legislative anxiety which dictated the Act 1592 again appears in the Act 1597, c. 257, which prohibits the exportation of the "great burne coale" under pain of confiscation of ship and cargo, and directs provosts, bailies, customers, and searchers to arrest the ship's cargo and the persons responsible for this unlicensed trade, so hurtful to the common weal. Similar statutes had been passed in the years 1563 and 1579 (cc. 84 and 90), in which it is narrated that the quantity of coal exported (much of it being used, or said to be used, as the ballast of empty ships) had caused an exorbitant dearth and scantiness of fuel in the land. What we are now concerned with, however, is the condition of colliers. Down to 1606 they had not been distinguished from other miners, who under the Act 1592, c. 31, received a general exemption from taxation because their lives were exposed to daily hazard from the foul air in the pits. But the Act 1606, c. 11, "anent coalyers and salters," prohibits the hiring of salters, colliers, or coal-bearers who have not got a sufficient testimonial from their last masters, or a sufficient attestation, made before a magistrate, of some reasonable cause of removing, *e.g.* that the last master had no more coal to work. If they had not got one or other of these documents, their masters might demand delivery of them from the new employer within year and day. The penalty on the new employer, if he failed to deliver, was £100 Scots for each man; while the colliers and salters who took forewages and fees were reputed and holden thieves, and punished in their bodies. Power was also given to the owners of coal-heughs and salt-pans to apprehend vagabonds and sturdy beggars and put them to labour. The Act of 1606 was in 1641 and 1661 (c. 56) extended to "watermen who lave and draw water in the coal-heugh head," to windsmen, and to "gatesmen who work the ways and passages in the said heughs," all these persons being as necessary to the owners as the hewers and the bearers. The statute of 1661, on the narrative that the giving of great fees had been the means of seducing many hewers from their masters, goes on to prohibit coalmasters to give a greater fee or bounty than twenty merks. Upon a further narrative that coal-hewers and salters are in the habit of lying from their work at Pasch, Yule, and Whitsunday, which time they spend in drinking and debauchery, this Act directs all these men to work six days in the week all the year round, except at Christmas, under a penalty of 20s. Scots for each day of idleness, to be paid to the master, besides punishment of their bodies. The general policy of these Acts has been stated by Lord Stair,¹ who introduces the subject incidentally in treating of probation extraordinary and the presumption in favour of liberty. He says it is founded on "the common interest, these services being so necessary for this kingdom, where the fuel of coal

¹ Works, IV. xlv. 17.

is in most parts necessary at home, and very profitable abroad; and seeing we have no salt of our own but that which is made by the boiling of salt water, salters are also so astricted" (i.e. though there was no paction or engagement): "so that colliers and salters while they live must continue in these services, and the once having them in service is a sufficient ground to detain or recover them; yet so, that if that possession hath not been lawful, another who did possess, and from whom they did unwarrantably remove *vi, clam, aut precario*, may recover them from the unlawful possessor." Both Acts of 1606 and 1661 have been the subject of criticism and decision. Thus Sir George Mackenzie tells us¹ that the power to claim delivery and to apprehend beggars was generally extended to tacksmen, and not confined to the owners of coal-heughs and salt-pans; and he adds, with regard to the clause declaring deserting colliers to be holden thieves, that "none ever died upon this Act." The ordinary action against the resettlers was before the Privy Council.²

In discussing the question whether masters of one manufacture might sue others of the same manufacture for reset, Sir George Mackenzie observes that he had "seen action granted in the Council against heritors who had enticed away other men's *fishers*." This loose and tyrannical custom, if it ever existed, received its quietus in the cases of *Laird of Woodney v. His Fishermen on Don*, reported by Lord Fountainhall and Forbes of Foveran, Feb. 16, 1698, vol. i. 825, and *Allan and Mearns v. Skene of Skene and Burnet of Monboddie*, Dec. 1728, M. 9454 (*voce Pactum Illicitum*). In the first case Forbes claimed the fishers as having been born on his land, and therefore by the custom of all the coast-side disabled from hiring themselves to another without his consent. The defenders replied that even if they were astricted, the pursuer had no boat, and they were therefore free to go; but, further, that the liberty of the subject was *juris naturalis*, and that slavery could be introduced only by paction or by statute, as in the case of colliers. After allowing a proof of the alleged general custom prevailing in the North, the Lords found that this custom was confined to particular places, and they condemned it as a *corruptela* and unlawful, and tending to introduce slavery, contrary to the principle of the Christian religion and the mildness of our government. They therefore found that there was no law astricting fishers to the ground where they were born. In the second case the tacksmen of the fishing-boats belonging to the village of Johnshaven had taken an obligation from the crews to remain each with their own boat for three spaces of nineteen years, paying a certain rent for the boat, which they were never to quit. The form of action was a reduction on the ground of minority and lesion, but the contract was reduced, "as being too great a restraint upon natural liberty." These deci-

¹ Observations on the Acts, p. 323.

² In 1608 a singular stretch of the prerogative was made by the issue of a charge from the Secret Council, prohibiting the workmen from leaving the royal silver mines. (See Cochran-Patrick, *op. cit.*)

sions show that the Court firmly opposed any extension of the obnoxious principles sanctioned on grounds of mistaken policy by the Acts. They may be contrasted with the early case reported by Durie of *Laird of Capprington v. Geddeu*, March 24, 1632, M. 9454 (*voce Pactum Illicitum*), in which Geddeu had subscribed a bond to work all his life at Capprington's coal-heugh. This bond was said to be "*contra bonos mores*, against Christian liberty, and in the nature of a bond of manrent." It is impossible to construe statutes by the principles of Christian liberty; indeed, what a statute recognises as lawful cannot be *contra bonos mores*. As regards manrent, this, as Lord Stair has remarked,¹ and as is abundantly evident from the statutes abolishing it, viz. 1457, c. 77, and 1555, c. 43, was not a payment for work, but a payment for protection to the *maintainer*, thus giving rise to something which resembled the relation of patron and client. The Court accordingly in Geddeu's case found that the bond was lawful. Mr Erskine,² indeed, seems to dispute the doctrine that one cannot bind one's-self to perpetual service, this being contrary to the inalienable right of liberty. He says it is not more inconsistent with liberty than an engagement to serve for twenty or thirty years; and he quotes Grotius³ for the proposition that there is nothing repugnant to reason or the peculiar doctrines of Christianity in a contract for perpetual service, the master engaging to supply the necessaries of life.⁴ It must be remembered, however, that Mr. Erskine, though he must have considered the argument in the case of *Shedden* (1757),⁵ died four years before the great case of *Sommerset* in the King's Bench of England, and ten years before the case of *Knight v. Wedderburn* in the Court of Session (1778),⁶ which decided that service for life without wages is slavery, and cannot be made the subject of a valid contract. Mr. Erskine's doubt was quoted ineffectually as an authority for the master or owner in *Knight's* case; while *Allan v. Skene* was quoted to show that even where there was a consideration perpetual service could not be legally stipulated. Lord Bankton expressed a different opinion,⁷ that service for life or for three times nineteen years could not be legally stipulated, but so far as his opinion was founded on the case of *Allan v. Skene* it does not seem to be sound. In *McDonnell v. Dixon*, March 1, 1805, F.C., a contract for eighteen years was sustained. The point of the legality of perpetual service has in fact never been decided. It was raised in the case of *Fairie v. M'Vicar*, July 1775, which is not reported, but the substance of which is given

¹ Works, I. ii. 12.

² Inst. I. vii. 62.

³ De Jure Belli, III. v. 27.

⁴ It was in 1743 that the extraordinary sentence of the Court of Justiciary was pronounced, condemning a man to perpetual labour in the colliery of Erskine of Alva.

⁵ M. 14,545. In *Shedden's* case the negro died pending the proceedings. Lord Kilkerran (5 Br. Sup. 324) adds the following note, which jars strangely on the prose of the Dictionary: "*Mors ultima linea rerum*. There the servant shall be free from his master. The poor young man is dead, and so has put an end to the question, What influence Christian charity or love to our neighbour, whatever his colour is, ought to have!"

⁶ M. 14,545.

⁷ Bankt. I. ii. 83.

by Mr. Hutcheson.¹ There the engagement was for life as the grievance of a colliery, and Lord Kames ordered argument on the point whether this was lawful. But the case was decided against the master, on the ground that he had required his grievance to do labourer's work.

Although there are several decisions upon the Act 1606, reported in the Dictionary, M. 2349-2363, not much of interest is recorded. The operation of the Act was confined to "ganging pits," so that if the work stopped the collier might leave. The first owner, however, if he had not given a testimonial, might reclaim them, unless they had been at work at another pit for a year and day without challenge from him. On the other hand, it appears that where the coal failed the owner could not assign his colliers to another. The case of *Dundas* in 1754 is to the effect that what is called the right of property in colliers was not forfeited by the prescription of year and day mentioned in the Act. But Lord Kames (Select Decisions, No. 69) has given very good reasons for dissenting from that judgment, and it cannot have ruled practice for any length of time. Latterly the original doctrine that accepting work at a colliery implied *adscriptio* was modified to the effect that a year's work was required to make the collier *adscriptus*; and, indeed, in the case of *Clark* in 1764, it was laid down that a special pactio of slavery was required for this purpose, and that no duration of working would serve instead. The only other point worth notice is that in the *Rutherglen* case in 1747 (M. 2352) colliers who had been admitted burgesses were held entitled to vote at the meeting of unincorporated burgesses. It was objected that they were too much under the control of their masters, and the analogy of town-pensioners and "beedmen" was quoted. But although the Burgh looked on it as a "great indignity," the Court upheld the vote.

A loose comparison is sometimes drawn between the *status* of these Scottish colliers and salters, and that of the *adscripti glebæ* or *ascriptitii* of the later Roman law. The condition of the latter class is very fully treated of in the 11th Book of the Code. They are to be carefully distinguished from the *coloni inquilini*, *coloni liberi* or *tributarii*, who had rights of property and of action, and were merely subject to certain payments and services for their land,—who, in fact, resembled the English freeman who held by tenure of villeinage, and who, as Bracton says, was a villein *non ratione personæ, sed tenementi*. But the *adscriptitii* proper, or *censiti* (so called from their being entered in the census or *album* as connected with a certain property), though classed as *ingenui*, had no property and no rights of action, at least against their masters. They could not go away from the particular estate on which they worked, nor could they be sold apart from this estate. But the crowning feature of their condition was the fact that the *status* descended from parent to child. According to a late con-

¹ Justice of the Peace, ii. 161-168, note; and see Fraser on Master and Servant, pp. 26, 27.

stitution of Justinian, the child took the condition of the mother, as in the case of slavery. Now the colliers and salters had not only many rights against their masters and the rest of the community, but the descent of astrictio from parent to child was quite unknown. They were, in fact, free, except as regards the incidents of the perpetual contract which, on mistaken grounds of public policy, the law implied from the fact of their taking employment at a colliery. Lord Stair in his chapter on Liberty and Servitude¹ admits that bondage, though contrary to natural liberty, is lawful. He says the only kind of bondage now remaining among Christian nations is that of the *adscriptitii*. "Such," he says, "are the English villeins; but in Scotland there is no such thing." Mr. Brodie adds in a note founded on Sir Thomas Smith's "Commonwealth," iii. x., that in Lord Stair's time villeinage in England was extinct. This is probably true, but it survived by a century the similar institution in Scotland, which, as we have seen, was entirely different from the modern *status* of colliers and salters. Sir Thomas Craig, who wrote his epistle dedicatory to King James in the year of the Collier Act, 1606, makes this still clearer. After explaining that the tenure by villeinage is not known in Scotland, and that the passages in the "*Regiam Majestatem*" about claims to liberty by *nativi* do not represent the practice in Scotland, he goes on to say: "Apud nos omnis servitus etiam quoad bona extincta est, famulis, quos servientes dicimus, sua bona integra manent, et proximus ex sanguine in eis succedit" (Lib. I. ii. *De feudis*). And he then gives a very neat definition of the English villein as "qui vel in actis curiæ se professus est villanum, vel ex patre villano natus est." We do not, of course, suggest that one definition of rights will apply to the various developments of the villein class at different times and in different places, more or less directly affected by the Roman and the feudal law. Thus, Ducange informs us that among the Burgundians the class of *rustici* or *rusticani* were under this special disability, that they could not dispose their property without the consent of their master, or even bequeath it, and then the bequest was confined to their children. This shows an advance on the early condition of the *adscriptitius*. Then, of the *homines proprii* or *originarii* of mediæval Germany, alluded to by Lord Bankton,² Gudelinus, in his essay *De Jure Novissimo*, tells us that although they underwent manumission like slaves, and could not sue their masters, yet, like the English villein and the Scottish *nativus*, they could be ordained priests, although still bound to serve the cure of the native *vicus*, and also to provide a substitute for the prædial work. Marriage between the *originarii* of different farms was permitted, and the offspring became subject to the power of the father's master. In contradistinction to all this, Mr. Erskine clearly brings out³ that not only birth, but even service while a pupil in a colliery as bearer to a father or other kinsman,

¹ B. i. 2.² Bankton, I. ii. 82.³ Just. I. vii. 61.

was insufficient to impress the servile character. He even suggests that service as bearer after puberty would not be sufficient if the father had not been originally astricted. No doubt, as Lord Cockburn says,¹ the colliery was the natural destination of most of the children, but this is very different from a law necessarily interfering with their freedom. The real analogy between the collier and the villein, or the *adscriptitius*, was that they all were connected with a particular vill, manor, estate, vicus, or colliery. By the twenty-first section of the Heritable Jurisdictions Act of 1747 it was declared that in spite of the abolition of the jurisdictions previously belonging to barons and to heritors infest *cum curiis*, every heritor or proprietor of lands in Scotland within which any coal-works, salt-works, or mines of any kind are or shall be carried on, shall and may be at liberty to exercise such power and jurisdiction as is competent to him by law over the colliers or salters or other workmen employed in carrying on these works. The only limitation upon this jurisdiction was expressed in sec. 22, that the reservation should not imply a power to give sentences of death or demembration. These two sections were not repealed till 1867 (30 & 31 Vict. c. 59). What was this power and jurisdiction competent by law in 1747? It is described in very comprehensive terms by Dallas in his quaint style of a contract and charter of coal (Styles, pp. 769-777): "The heritable office and jurisdiction of Bailliarie thereof and upon the tennents, colliers, quarriers, grieves, workmen, and others ('tenentes, carbonum effessores, cessores, carbonum præfectos, *servos carbonarios*, aut vectores, haustores aquarum,' etc.) haunting and resorting to and from the same, and to remove, output, and input them in prison as they shall think most expedient." It is right to say that the Style, though published in 1697, was written in 1601. It cannot be said that the reported decisions in the Dictionary (*voce Jurisdiction*, Baron, pp. 7530-7547) make it clear how far the jurisdiction of a baron or a heritor would extend over colliers. Even in the ordinary case the Act of 1747 left untouched a civil jurisdiction up to the sum of 40s. of debt or damages, and a criminal jurisdiction in petty assaults, batteries, and lesser crimes punishable by fine of 20s., with an alternative of the stocks or prison; and the owners of collieries had therefore much larger powers of imprisonment and process against their servants. The baron also had a power (not taken away till 1813, 53 Geo. III. c. 40) of fixing the reasonable prices of work in the barony. This, however, does not seem to have applied after 1775 to the class of colliers, if indeed it had applied to any class of servants or workmen after 1617. For by the Act of 1799 (39 Geo. III. c. 56) it is declared that thenceforth colliers and salters are to be subject to the provisions of the celebrated Commissions in favour of justices (Acts 1617, c. 8, and 1661, c. 38), under which the "ordinary hire and wages of workmen, labourers, and servants" were fixed twice a year at Quarter Sessions, those who refused to work at the prices

¹ Memorials of his Time.

fixed being put into prison. This power of the justices went gradually into disuse both in England and Scotland. It could not of course be extended, even in terms, to the numerous new industries of the eighteenth century which in England escaped from the restrictions of the Statute of Apprentices, or obtained self-regulating powers by Royal Charter of Incorporation. As Mr Hutcheson says in 1817:¹ "It has not for a long time been the practice for justices of peace to settle or enforce tables of wages, whether relating to agriculture or to any other country labour." He adds that even in questions between incorporated tradesmen and their journeymen as to wages or hours the aid of the magistrates was seldom invoked. Mr. Small makes an interesting quotation from the work of Prof. John Millar on Ranks (pp. 307, 308), to the effect that while in 1773 common labour brought on the average from 4s. to 6s. per week, colliers for eight hours' work a day earned 12s. to 13s. per week. Millar recommends the coalmasters to get an Act of Parliament abolishing the serfdom, as this would cheapen the production of coal.² The high wage of colliers seems, however, to have survived the Enfranchising Act of 1775, for Adam Smith, whose great work was not published till 1778, quotes it as an illustration of the effect upon wages of the dirty, dangerous, and disagreeable character of the work. The Act of 1775 in its preamble bears witness to the extreme difficulty of getting men to bind themselves as colliers, and to the fact that in consequence many valuable coal-levels were not being worked at all, and others insufficiently. It says, "Persons are discouraged and prevented from learning the art or business of colliers or coal-bearers." Dr. Chambers in his "Domestic Annals of Scotland" (vol. iii.) prints some of the advertisements for colliers which were issued about the middle of the eighteenth century, and which testify to the same thing. We have only to add that the tone and spirit of the Act of 1775, and of the final Enfranchising Act (39 Geo. III. c. 58), passed because for obvious reasons the colliers did not take proceedings before the Sheriff for decree of liberation under the former statute, are entirely against the notion that a life engagement would be recognised by the Courts of Law. It could certainly not be recognised on grounds of public policy. It is a strange illustration of the hopeless muddle into which the Statute Book had got that the Acts of 1775 and 1799 were not repealed till 1871. Of the latter Act, indeed, two sections are excepted from repeal. They are those dealing with a practice which had probably as great an influence as the law of serfdom upon the condition of the colliers: the practice among coal-owners and lessees of advancing sums to their colliers beyond what they could repay for the purpose of keeping them in their employment. The power to lend was restricted to sums required for support in time of sickness, and the mode of recovery directed to be by deduction from the weekly wage.

¹ Justice of the Peace, ii. 180.

² In the seventeenth century the Privy Council had frequently fixed the price of coals, e.g. at 7s. per horse-load.

INTERNATIONAL JURISDICTION.

IV.—TRADE DOMICILE.

THE only other question to which we desire at present to direct attention is that of a jurisdiction founded on agency, business branch, sub-office, or subsidiary trade domicile. Some light, as regards the law of England on the subject, may be got from the case of *Carron Iron Co. v. M'Laren*, July 11, 1855, 5 H. of L. 416. The Carron Company had an agent in London, named Stainton. On his death, leaving considerable property, both real and personal, in England and Scotland, the Company raised action against his executors in the Court of Session, on the dependence of which they used inhibition and arrestment. They, however, had previously begun an administration suit in Chancery (so far resembling a sequestration, being a *commune forum* for creditors and legatees), in the course of which the Master of the Rolls granted injunction against the action proceeding in Scotland. But the injunction was recalled in the House of Lords (Lord St. Leonards dissenting), because it was not shown to be clearly conducive to justice. The question whether the courts of one country will restrain proceedings in the courts of another, when their own jurisdiction affords in their opinion complete relief, is of course one of discretion; and the decision of it assumes that the person restrained is subject to the jurisdiction of the restraining court, either generally or because he is a party to a particular action which depends in the restraining court. The English Court of Chancery restrains a foreign suit wherever it would restrain an English suit.¹ But in *Carron Co. v. M'Laren*, although there was an English administration suit to which the Scottish Company was called, but in which they did not claim or seek to prove, Lord Cranworth said there was no rule in the Court of Chancery that on an administration decree being pronounced the Court would interfere with a foreign creditor resident abroad, suing for his debt in the courts of his own country. His Lordship had, therefore, to consider the question whether or not the company was subject to his jurisdiction by reason of their having agencies established at some places in England. It appeared from the affidavit of the Company's agent that it was a Scottish corporation, with its factory situated in Scotland, and with an agent or manager there; that the office of the Company and its books were also there; that the manager at Carron was the sole manager. Stainton, a representative and successor of the deceased Stainton, had been served with notice of the motion for an injunction, but he had no power to represent the Company or to do any act on its behalf, except to sell the manufactured goods of the Company for the time being intrusted to him for sale. It was admitted that the

¹ *Bushby v. Munday*, 5 Madd. 297; *Elliot v. Lord Minto*, 6 Madd. 16; *Kennedy v. Cassilis*, 3 Swanst. 313.

existence of agents might in certain undefined cases enable third parties to sue the principals by reason of their being for certain purposes represented by such agents. The gist of the decision was that "it would be a strange anomaly that the accident of the creditor having goods in the foreign country, and an agent there for the sale of them, should prevent him from having the same means of recovering payment of a debt in the country which he would have had if he had happened to have no agent nor any goods abroad." The judge, therefore, considered the Company to be a foreigner, and they also considered the point whether there was a good notice of motion to the agent Stainton; and it was the opinion of Lords Cranworth and Brougham that the notice was not good; in which case it is difficult to see how a right could exist in third parties to sue the principals in England. Lord St. Leonards, who dissented from the judgment, held very distinctly that the facts of the case disclosed a *business domicile*. The questions of citation and jurisdiction are always closely connected, and they came up together again in the case of *Newby v. Von Oppen and Colt's Patent Firearms Manufacturing Company*, L. R. 7 Q. B. 293. There an American corporation was sued for the breach of a contract made at a place of business in London by a manager or head officer. Lord Blackburn, in deciding that the action was properly brought, referred to the fact that several Scottish banks and American corporations had set up branches in London, and quoted with approval the observations of Lord St. Leonards in *Carron Iron Company v. M'Laren*: "If the service on the agent is right, it is because, in respect of their place of business in England, they have a domicile in England; and in respect of their manufactory in Scotland, they have a domicile there. There may be two domiciles and two jurisdictions; and, for the purpose of carrying on their business, one is just as much the domicile of the corporation as the other."

The Scottish law on this important subject is stated by Professor Mackay in his learned work on Practice, vol. i. p. 182, as follows: "Where a company has its principal place of business out of Scotland, but a branch office in Scotland with power to enter into contracts and settle claims arising out of them, it is liable to the jurisdiction of the Court of Session *with reference to such contracts and claims*." Thus in *Bishop v. Mersey and Clyde Steam Navigation Co.*, Feb. 19, 1830, 8 S. 558 and 2 Sc. J. 243, the action was brought in the River Bailie Court by one English house against another on a contract entered into at Liverpool. Two directors and partners of the defender's company lived in Glasgow, but this, on the principle of the well-known case of *Reid & McCaul v. Douglas*, F. C. June 11, 1814, was of course insufficient to found jurisdiction against the separate *persona* of the company. But Laird & Company of Glasgow acted as agents of the company, and at their offices in Glasgow orders were taken and the shipment of goods was superintended, and the regular business of the company was

transacted with the public. The Bailie found that: "An English joint-stock company of carriers between England and Scotland subjects itself to the jurisdiction of the Scottish Court by having a permanent establishment in Scotland of partners or agents, and a place of business at which the affairs of the company are transacted in the name of the concern, and which constitutes the mercantile domicile of the company." This judgment was unanimously adhered to by the First Division. In the earlier case of *St. Patrick Assurance Co. v. Brebner*, Nov. 14, 1829, 8 Sh. 51, an Irish company had appointed agents in Leith, who again, under a power given them to that effect, appointed Matthew as sub-agent at Aberdeen. The company further published and circulated in Scotland a prospectus, stating that their contracts of marine assurance were binding as soon as an order was accepted by their agents, who were authorized to adjust and pay in cash all losses and averages. The action was brought in the Admiralty Court on a policy issued at Aberdeen in favour of Brebner. The question of jurisdiction did not arise purely, because arrestments had been used of moneys in the hands of the agent at Aberdeen, and the leading point for decision was whether interest was due on the balance under the policy as a Scottish contract, or not due under the policy as an Irish contract. Accordingly Lord Balgray's judgment is to the following effect: "The Irish company employ their mandatories or agents here to effect contracts of insurance. To induce merchants to deal with them, they not only set forth that the contract commences so soon as an order of insurance is accepted by the agent, but also that all claims arising out of it against the company are to be settled on the spot by their agent. Brebner did not therefore form in this case an Irish contract to be ruled by the laws of Ireland, of which he may know nothing: he is entitled to insist on implement of it as a Scottish contract, and I think that interest has justly been found due." Eliminating the element of arrestment from this case (and it is difficult to suppose an agency in Scotland in whose hands arrestment *ad fundandum* might not be used against their principals), it will be seen that the principles appealed to as determining the *lex contractus* are very much the same as were held to determine the jurisdiction in the case of *Bishop*. Wherever, as regards the public, the business is being carried on in the same way as at the principal establishment, there jurisdiction will exist. And the question of contract law in the case of *Brebner* is one which, as we have seen in discussing the claims of the English and Irish Courts, has an important bearing on the question of jurisdiction. Where was the contract made? for if it was made in Scotland, then, according to English and Irish principles, there would be a Scottish jurisdiction. On the other hand, if it was made in Ireland, but an obligation to pay or settle in Scotland was broken there, then still, according to English and Irish principles, a Scottish jurisdiction

would exist by virtue of the breach of contract. And on any view a conflicting Scottish jurisdiction might be raised by arrestment. The connection between these two questions of jurisdiction and *lex contractus* (which is at least frequently the *lex loci contractus*) is further illustrated by the case of *Parker v. Royal Exchange Assurance Company*, Jan. 13, 1846, 8 D. 363, where a domiciled Scotchman made proposals for insurance on the life of a Scotchman with an English Insurance Company through their agents in Edinburgh, whose duty it was to receive such proposals and to transmit them to London, but who had no power to accept risks or to conclude contracts. The policy was prepared and executed in London. It undertook the risk on payment of the premium, which of course was not paid until the policy had been transmitted to Edinburgh for delivery on receipt of premium by the agents. An action was raised on the policy by an assignee in the Court of Session. Arrestments to found jurisdiction were used. The Court repelled an objection, not to the jurisdiction, but to the *forum*, as inconvenient and improper. This was founded chiefly on such cases as *Brown v. Palmer*, 9 Sh. 224; *M'Master*, 11 Sh. 685; *Young v. Ramage*, 16 Sh. 572; where, in spite of arrestments used against executry funds to found jurisdiction, the Court refused to proceed against foreign executors who were properly administering the estate abroad, or where the Court recognised the "manifest expediency of trying all questions at the partnership domicile, where the books and property may be expected to be, and where the partners concurred in carrying on the business." The Court also found that, the place of execution and the place of payment being both in England, the contract was English. As Lord Moncreiff said: "I apprehend that the mere circumstance of this contract having been transmitted through or by the hands of an agent in Edinburgh cannot have the effect of changing that which was in its nature essentially an English contract, made under the law of England, into a Scottish contract, to be ruled in its nature, construction, and effects by the law of Scotland. I subscribe entirely to the doctrine delivered by the Lord Chancellor Lyndhurst in the case of *Mills v. The Albion Insurance Company*, 3 W. & S. 233. It lay at the bottom of that case that the agents established by the Albion Company not only had power to enter into contracts in Scotland to bind the company, but that they actually did enter into such a contract." What generally happens in the case of insurance business is that the agents merely receive proposals, but the contract is made at the head office. We have, however, already pointed out that in Ireland the delivery of a policy by an agent abroad is held to amount to a making of the contract in the foreign jurisdiction, and therefore to subject the insurers to the foreign Court. This doctrine has been quite recently affirmed by the Irish High Court of Justice, Q. B. Division, in the case of *Hayes v. Accident Insurance Association of Scotland*,

May 15, 1878, Ir. L. J. vol. xii. p. 71. There the Dublin agent of an Edinburgh Limited Company had authority to transmit proposals, to receive payment of premiums, but not to issue policies. He sometimes received money to be applied in settlement of claims, but he had no power to compromise. The only valid premium receipts were those issued at Edinburgh, where also the company bound themselves to pay. The company had no property in Ireland. On the other hand, the facts connected with the accident had all arisen in Dublin. The Court, proceeding on *Kett v. Robinson*, 4 N. C. L. R. 186, made absolute a conditional order for service out of the jurisdiction.

Professor Mackay states it as his opinion (Practice of the Court of Session, vol. i. p. 183) that "the Court of Session has not jurisdiction against a company in an action on a contract made and to be executed out of Scotland, although the company has a subsidiary place of business in Scotland." This, however, appears to be an unreliable inference from the decisions relative to competing jurisdictions in the Sheriff Courts. Thus in *Dick v. Great Northern Railway Company*, 33 Jur. p. 2, an action was brought in the Sheriff Court of Banffshire for the value of goods which had perished at the Keith station of the defenders in the county of Banff. The summons was served by leaving a copy at the station. It was urged for the railway company that under the Railway Clauses Act and at common law they could be cited only at their "principal office" at Aberdeen, and sued only in the jurisdiction in which that office was situated. L. J.-C. Inglis and Lord Ivory, the judges on circuit, held that as the company carried on business at Keith, they had a trading domicile, and might be cited and sued there. In holding this they merely followed the decision in *Aberdeen Railway Company v. Ferrier*, 26 Jur. 198, where the First Division held that the railway company had a domicile wherever they had an establishment for the purpose of receiving goods. The judges say so in general terms, but Lord Rutherford observed: "The company is at Brechin: it is not merely their agent who is there. I think they are lawfully sued at the place where the contract was entered into." But, according to a rule of obvious convenience, where a railway company has a head office, and also branch offices all in different counties, it will not be allowed to sue the company in county A. on a cause of action, e.g. a contract entered into or breach committed in county B. (*Edward v. Inverness and Aberdeen Junction Railway Company*, 4 Irv. 185). But there is a great difference between being compelled to choose between two inferior Courts and being compelled to go into a foreign country in search of the principal domicile of a company against whom you have a claim. Of course, except in very special circumstances, only a Scottish creditor would be interested in raising the question in Scotland. It is not likely, however, that the point will ever be decided, because in nearly every case of a subsidiary

trade domicile there will be either heritable property or funds liable to arrestment.

The 46th section of the Sheriff Courts Act, 1876, lays down the broad principle that "a person carrying on a trade or business, and having a place of business within a county, shall be subject to the jurisdiction of the Sheriff thereof in any action, notwithstanding that he has his domicile in another county, provided he shall be cited to appear in such action either personally or at his place of business." It will be observed that there is here no limitation of the jurisdiction so constituted to claims connected with the business carried on in the county; nor, on the other hand, is there any exception of contracts made, or to be executed, beyond the county. The jurisdiction affirmed is apparently co-extensive with the competency of the Sheriff Court. It would be unreasonable to suggest that the section extends the competency of the Sheriff Court, but it is by no means clear that it does not apply to the case of a foreigner or a foreign company having a place of business in the county. We have already seen that the Sheriff Court has jurisdiction against foreigners, personally cited within the county, when the county is the *locus solutionis* (*Pirie v. Warden*, 5 Macph. 497). There is therefore in the Sheriff Court no inherent disqualification to entertain an action against a foreigner. In the decisions which preceded the Act of 1876 there is, no doubt, much to suggest a limitation. Thus, in *Ritchie v. Wilson*, 6 Sh. 552, a petition was presented to the magistrates of Glasgow for recovery of titles which the petitioner had deposited with a writer who had an office in the burgh where the deeds were delivered, but who resided in Kincardineshire. The view which Lord Corehouse took of that case was, that as the defender did not reside in the jurisdiction, and the claim did not arise out of the defender's business as an agent in any court in which he practised, there was no jurisdiction. The Court, however, adopted the somewhat artificial view that the deposit of the titles implied a contract to redeliver in the same place, and that there was therefore jurisdiction. In the case of *Hunter v. Fairweather* (15 Sh. 693) it is impossible to decide from the Report whether the judgment sustaining the jurisdiction was founded on the existence of a place of business in the burgh, or upon the dependence of a process in the Burgh Court. *Young v. Livingston & Son* (Mar. 13, 1860, 22 D. 983) was an action in the Haddington Sheriff Court for price of coal and cartage of coal against a firm of brick and tile manufacturers, who had a work (with a small shed for an office) at Rentonhall, in Haddingtonshire, but the partners all lived in the shire of Edinburgh, in which they had their principal place of business. Sales were made and the workmen paid at Rentonhall, where also the pursuer had delivered the coals. The objection to jurisdiction was, not that it was ill-founded on the existence of a branch office belonging to the company, but that the defender was an individual to whom

this principle did not apply. No reason for this distinction is alluded to, and the Court held that as the defender had represented himself as a firm, he could not object to the jurisdiction. There seems to be a little confusion between citation and jurisdiction in the judgment delivered. Again, in *Harris v. Gillespie and Others* (July 20, 1875, 2 Rettie 1003), it was held by Sheriff Fraser, and affirmed by the First Division, that a well-known Glasgow sugar firm were subject to the jurisdiction of the Sheriff Court of Renfrewshire, because they had in Greenock a warehouse and a branch office, with a staff of clerks and a set of books, with accounts in local banks, though the sales were made on the Exchange, and the business practically conducted by partners coming down from Glasgow. The Greenock chief clerk, however, was entitled to sign per procuracion.

If, as regards the Sheriff Courts, the jurisdiction based on the place of business is general, and not confined to business contracts or claims, or, what practically will be the same thing, claims under contracts made at the branch office, or to be executed in the county where it exists, on what principle is it said that these limitations must attach to the jurisdiction when the subsidiary place of business is in one country and the principal place of business is abroad, or where there is a place of business in one country and the sole trader or all the partners are abroad? The exclusion of actions relating to status, as in the jurisdictions constituted otherwise than by personal domicile, would of course be quite intelligible; but it would be difficult to state why a private debt should not be sued for where the debtor was liable for mercantile debts, unless there was some extreme and insupportable inconvenience in trying the case there. This inconvenience might more easily arise in the case of contracts made or to be executed abroad; but, as we have already observed, there would seldom be an interest in such cases to raise this question, unless for the purpose of selecting an advantageous *lex fori*.

ON CERTAIN PRINCIPLES AFFECTING THE LIABILITIES OF MASTERS AND SERVANTS.

VI.

THE debate in the House of Commons on Mr. Macdonald's Bill, which occurred on Wednesday the 10th of April last, was after all but a poor contribution to our knowledge of the intricate questions of liability we have been endeavouring to sift and study. In point of fact the speeches delivered do not, so far as we can see, add a single fact or adduce a single argument we had not otherwise been provided with. This, of course, is much to be regretted, but fortunately food for considerable thought and the development or refutation of not a few arguments is to be found in the animated

and varied literary productions which, from judges and leader writers, from jurists, from legislators, and many others, filled for a time the columns of the public journals alike in the metropolis and in the provinces. In the House of Commons' debate we cannot fail to observe universal condemnation of the law as it at present stands; clearly, whatever the change is to be, people don't like what they have got at present, and we may also feel pretty sure that when the change does come it will not be in the direction of going backwards. Mr. Macdonald, when moving the second reading of his Bill, boldly proclaimed that at the present time no man knew precisely what the law was, and that it really was in a state of chaos. It may, however, be safely said that whatever the opinions of different critics as to its effect, it is quite impossible to assent to any such proposition as this. It is perfectly clear what the law now is, though no doubt, in Lord Cairns's words, it "has only lately approached maturity." We should welcome a material change in the law, a change effected by careful Parliamentary action, tending moreover in the direction desired by Mr. Macdonald; but surely it is doing harm rather than good to the cause he has at heart to speak thus: "The decision of yesterday was not the decision of to-day, nor would the decision of to-day be the decision of to-morrow. Judge-made law was dangerous law, and they ought not to wait until the law had matured in the minds of judges." Now one thing is shown distinctly in the course of these decisions, and that is their steady and even course. It is all very well to quote Scottish law and its early judgments, and "there you have a discrepancy and law at variance with law," but it is always to be remembered that when we look to decisions on such points as these, it is the judgments of the highest tribunal in the country which alone form a true guide; and the House of Lords, as we have seen, on the very first opportunity presented to it, pronounced the law of both countries to be identical, and simply followed the line it has consistently adopted since the question was first put in practical shape. All discussions as to what the law was before the first decision in *Priestly v. Fowler* are beside the question. It does not injure the force of the argument to admit that before that famous judgment the workman never thought of trying the point because he believed it against him. Nor does it increase the strength of the objections to the existing law to assert a belief that at common law the very opposite was formerly the case. All that materially affects present considerations is the question whether what is now law is right, is equitable, is politic; or whether, if not so, it can be readily modified so as to bring it within those necessary conditions of all sound legislation. What the judges have done has been merely to develop those principles which, rightly or wrongly, were held to exist, and to attack the law as judge-made really amounts to saying very little indeed. The mistaken judgment that would dictate such statements is very aptly illustrated by two questions asked by Mr.

Bulwer, M.P., when examining one of the witnesses before the Commission, and the replies given to him: *Q.* "You have been asked about judge-made law; does that convey any definite idea to your mind?—*A.* By judge-made law I take it is meant the repeated decisions of supreme courts, not the mere passing dictum of any ordinary judge. *Q.* Supposing I were to knock you down in the street, and you were to bring an action against the honourable member for Stafford upon the ground that he and I were both members of Parliament, and the judges were to decide against you, though it was the first time that such a case had been raised in a supreme court, should you say that that was a judge-made law?—*A.* Hardly." Whether "venerable from antiquity," or "created bit by bit by the judges," the law as we have it must stand the test of inquiry upon its own merits.

Perhaps there is no better statement of the position of the law as we have it among the many that have been attempted than that given in evidence before the Committee by Sir George Bramwell, to whose knowledge and experience every deference is due. The learned Judge says: "To my mind, the distinction of the cases where a man is, and where he is not, liable for the negligence of another person, may be defined in this way. If there is a contract between them, so that the person doing the work, or doing the act complained of, has a right to say to the employer, 'I will agree to do it, but I shall do it after my own fashion; I shall begin the wall at this end and not at the other;' there the relation of master and servant does not exist, and the employer is not liable. But if the employer has a right to say to the person employed, 'You shall do it in this way, that is to say, not only shall you do it by virtue of your agreement with me, but you shall do it as I direct you to do it;' there the law of master and servant applies, and the master is responsible; and I really cannot see the reasonableness of making the master liable in such cases. There is one ground on which it may be to some extent justified, which is this, that it ensures, or, at least, tends to ensure, the master making choice of a properly skilful and careful servant. And yet, oddly enough, if that were the reason, one would think he ought to be liable in the case of wilful misconduct, on the ground that he should have an inducement for selecting, not merely a careful and skilful, but a well-conducted and well-behaved person; but yet, in that case, he is not liable. I just wanted to make that remark about that head of the law; but it does not seem to me that the question before the Committee comes under that head." This, then, being the law as it is, and the apparently general feeling of our legislators being for a change of some kind, let us consider what can be said against a change in the direction of extended liability, and what for it.

INJURY TO TRADE.

One apparently favourite ground of objection to the proposed change

in the law is that suggested by "a judge of the Supreme Courts in Scotland," who, two days after the debate in the House, addressed to the *Times* a letter upon this subject. Advocating the maintenance of the existing state of matters at least, Lord Shand (for we understand the letter was his) makes these observations: "If, unhappily, the law be changed—contrary to the well-considered and dispassionate judgments of the last forty years, based as these judgments are on broad general principles alike of reason and convenience—the owner of a mine, large or small, will find himself subjected to a new responsibility, so weighty, that in many instances he must resolve to renounce such enterprises altogether. Men of ordinary means cannot undertake such risks. In the recent Blantyre colliery accident upwards of 300 men lost their lives in one pit. If, after a change in the law, such an accident should occur through any act of neglect or fault of a pit manager, however careful and skilful he had always been, the pit owner would find himself suddenly made responsible for the maintenance of the widows and children of several hundred persons—a pecuniary responsibility the very risk of which will be enough to drive many out of the trade to seek other outlets for their capital. The result, again, is not only injury to the community, but especially to the workmen, who, by pressing such claims, will greatly limit the number of those who can give them employment. And what is true as regards shipping and mining enterprise holds good in all other branches of industry in which the workman is liable to injury in the course of his employment."

Now these are remarks which cannot, in any view, be put readily aside. There is, no doubt, in them a shade of the same emotional principle which on the opposite side of the question may be found in such arguments as those of Mr. Macdonald, and a grievance is similarly sought and found. Yet there is something more than all that in the consideration advanced so truly, that if the masters have their business injured and their adventures crippled by such regulations, they will hesitate to employ their capital or to subject their whole pecuniary means to such risks, and that in consequence it will be the men who themselves ultimately suffer. Labour cannot be rendered available to the nation or to the individual without capital, and this new state of the law would drive away, or at least diminish, the capital embarked in commercial enterprise. Such, practically, is the view of the learned Judge; and we find in the pages of the Report evidence that many of the masters are of the same mind. We have our attention directed by them to the Mines Regulation Act, and to the rise in the price of working coal alleged to be due to the expense caused in carrying out its regulations. Still it is ever to be remembered, in answer to this, that increase in the cost of coal or of minerals *caused in this way* is not to be regarded as a misfortune, but as an unmitigated gain. If by paying something more any community at large obtains an article

without sacrifice of life, there is no sentimental doctrine advanced when we say that community has gained, has preserved in lives otherwise doomed to be sacrificed a labour payment for its outlay, and a payment fairly in value representing what it has cost to secure it. In viewing such an argument we must perforce look at the outside public, not at the interests of masters or interests of men only, and that outside public are really the gainers. As you pay largely for the pearl to procure which the diver risks his life, so also you pay for the luxury of the coal-fire burning in your grates. In both cases possession of the desired object is attained by imperilling life, and in both the payment for that risk should fall on those who enjoy the fruits of the workman's success. But the argument will be pressed further. It will be said there is a limit to all this; prices will rise, and you will be undersold in the markets of the world. Not so—not, at least, upon this account; for in all the civilized countries of the world, saving, perhaps, some States of America, so far as we know, the rule of liability obtains. If prices do rise too high, it will not be on this account; for this burden, if burden it be, already rests upon other nations. The rise will be due to other causes,—to the greed of the employers or the greed of the employed, to the desire to make over-large profits or to the undue inflation of the price of labour. Surely if it be true that, from the influence of one or both these causes, already we have difficulty at times in selling our goods, that is something better worth looking to; for the change now proposed will fix a certain enhancement of price upon each article, but will not go on gradually increasing the cost of production as the other influences at work have done and will do. In one sense, then, we see that while the public pay for the safety of the workmen by an enhanced price of the article produced, yet, in another, masters and men will themselves come to pay. The markets of the world are kept open to our commerce because we undersell our neighbours; that is to say, we produce a better article for the money than they can. If, however, this addition were made to our cost of production, we must, it is said, lose our market, because we can no longer undersell. It may be true that, with the addition to the price, we could no longer undersell; but the result might not be the loss of a market; it might be a fall in the price paid for labour, and in the profit of the employer, corresponding to the rise in the cost of production occasioned by the new law. In point of fact, if it be true that we are only by a margin underselling our neighbours, this last result would be inevitable, and the employer and the workman would have to divide the fall and consequent loss between profit and wages just as at present happens under the existing *régime*.

Upon one portion of his Lordship's letter, suggesting the idea of an extension rather than a limitation of employers' immunity, a "Jurist" pointed out in the columns of the press shortly afterwards that such an extension might lead to very remarkable results,

"Shall the employer," he asks, "of smaller capital or of no capital, the commission merchant whose clerk neglects to insure, the writer whose copyist blunders a conveyance, continue to be liable in damages to the customer or client whose interests he imperils?" An extension of the immunity would necessarily raise such difficulties. *Qui facit per alium facit per se* is a regulation the learned Judge considers should only apply in cases of directly authorized acts, thus cutting out, it would seem, all faults of omission, and removing almost all the grounds upon which contracts can be reduced for non-compliance with terms agreed on between the parties.

Travelling on, the writer asks pertinently, "What is the difference between the neglect of a pointsman to shift the points and the omission of a merchant's clerk to effect an insurance in time? In either case, the true cause of the blunder is neither implied authority nor want of skill, but the element of fallibility in human nature." Yet the one master is free, the other is liable.

IMPLIED CONTRACT.

It is urged, to explain this anomaly, that a workman who goes into any dangerous employment does so with his eyes open, that he knows, indeed must know, the risk of becoming, say, an engine-driver or a collier, but that, notwithstanding this, the counter benefits of the wages and so forth outbalance all drawbacks, and he thus voluntarily faces the danger. This, of course, is but our old friend, the doctrine of implied contract; the workman is in fact supposed to have bargained to risk life and limb at so much per hour, or day, or week. Here, again, the mover of the Bill started off at a tangent, and rushed into a disquisition upon rates of wages and workmen drinking champagne, yet the real point was put to one side. If this implied contract be really an entity, and if workmen do get enhanced wages from their masters for enhanced risks, for which these wages represent compensation in case of loss of life or injury to limb, then surely there can be no hardship in saying we will invert the position of matters. The men shall no longer act as their own insurers by such an implied doctrine, but the true test will be applied, the master will undertake the risks, and, of course, if your doctrine is a sound one, the wages must at once fall, for men will then be saved when entering the dangerous employment from the necessity of requiring payment of what is truly a special premium for extra risk. This, we think, is the proper argument which meets the "implied-contract" theory; and it has the advantage of being absolutely fair, because unless there is some such contract it can scarcely be denied that public policy requires that some means of compensation must be found to meet the injuries and risks incurred by those who in effect are, while supporting themselves, supplying the nation at large with the necessities and luxuries of life. On the other hand, if the contract does in point of fact raise the wages of these classes of men, there is no

doubt that it will come to the same thing for the employers in the end.

Again, we may employ another test for this doctrine of implied contract, and consider what actually occurs in the case of railway companies under the law as it at present exists, of their liability in damages to their passengers for injuries suffered by them when travelling. However carefully the erring driver, or pointsman, or guard may have been selected, his neglect of his duties for a few seconds may lead to the accident, and incur for his employers, the railway company, the liability deemed by some so unjust. But the basis of all that liability as regards those accidents which are capable of prevention is not implied contract at all; if it were so, then there would not be any impossibility in a company's making a bargain with its passengers, contracting itself in point of fact out of the bonds of the contract presumed by law against it. No such power however exists. What the railway company undertakes is to carry its passengers to their destination safe, at least against such accidents as may be preventable. That, as we have already endeavoured to show, is not equivalent to an insurance, it is only a *quid pro quo*, something in return for the conceded monopoly. The company also are able to do for their passengers what it is quite impossible for the passengers themselves to do, namely, to exercise over their employés a control and superintendence such as may reduce to a minimum the preventable risks of the journey.

The only true solution of the difficulty is to try the experiment, and the result cannot from either point of view be an injustice. Let it be tried, and we cannot but think that the whole of this doctrine of implied contract will fall to the ground; it may be admirable to behold, and indeed it may be essential in order to argue out logically the legal and technical position, but we believe that at core it is rotten. Once give it a trial, put the enhanced price, the premium for the insurance, upon the article consumed, and then see if the wages of the workman will fall; if so, they are getting the premium now in wages, and will then practically pay it in the enhanced "insurance charge," or, if the wages do not fall, the masters are making an undue profit; or, last of all, the public are burning their coals, and enjoying their necessities or their luxuries at the price of the workmen's lives annually sacrificed, for which nothing is being paid. If either of these last is the true state of matters let us see it ended, let us stop the profit earned at such a cost, and earned beyond measure, or let us cheerfully pay what must be paid in some way to alleviate the sorrow, the desolation, and the penury of these constantly-recurring calamities.

Working out these suggestions, we may ask, Who are the insurers? on whom is the risk to fall?

The workmen are to shift the responsibility on to the shoulders

of the masters, and to suffer no diminution of wages thereby, or at least will suffer none, if this view of the hollowness of the doctrine comes out on a practical experiment. We say by all means let the master run such a risk, let him face the question of compensation or insurance, for that indeed is the fairer and truer term, and we shall soon see him working himself clear. It is easy to show how in many a parallel instance this has been done. When, for example, a shipper insures his goods at sea, or writes off an insurance rate, and becomes his own insurer, as large shippers often do, is it to be supposed that all this premium paid or money written off comes out of his pocket and diminishes his profit? No one would venture to maintain such an absurdity for an instant.

Mr. Lowe, in a letter addressed to the *Times*, took up this question of presumed contract, and referring to the case of *Hutcheson v. The York, Newcastle, and Berwick Railway Co.*, decided in 1850, quoted the following sentence as the true basis of this explanation for the immunity of employers from liability: "Hutcheson knew when he engaged in the service that he was exposed to risk of injury, not only from his own want of skill or care, but also for the want of it from his own fellow-servant, and he must be *supposed* to have contracted on the terms that, as between himself and his master, he would run this risk. This was a risk which Hutcheson must be taken to have agreed to run when he entered into the defendant's service." Mr. Lowe's letter proceeds to indulge in a furious onslaught upon the judicial bench, which appears as unnecessary as it is inapposite. Starting upon the view taken by himself, that such a presumption of fact is "notoriously false," he indulges in a tirade against those who pronounced the obnoxious decisions, forgetful that there is really something to be said for the presumption, and that there is at least the undoubted freedom in the choice of his employment left to every man.

We do not believe in the implied-contract theory, as we have already indicated, nor do we think it would stand the practical test already suggested, but that does not justify such expressions as we now quote: "The law may no doubt annex certain duties and liabilities to certain positions; but I maintain that the judges have no power by virtue of their office to create false contracts, and then to enforce them as if they were true. To do so is not to declare the law, but to create false evidence by setting up a presumption of fact which is notoriously untrue."

REMEDY BY INSURANCE.

A "Jurist," to whose letters we have already adverted, puts a much stronger case in a much fairer way. Instead of troubling us with questions of antiquity or romance, he comes to practical everyday life, and he asks "whether the learned Judge is quite consistent when he asserts in his letter to the *Times* that Mr. Macdonald's Bill will have the effect of ruining trade and driving

capital out of the country, and in the same letter insists that a remedy may be found for the distress and suffering resulting from accidents to workmen by a system of insurance paid for by the workmen themselves out of their wages?

“‘Were,’ he says, ‘the great bodies of workmen throughout the land to lay aside a trifling part of their weekly wages and apply it in payment of premiums limited to insurance against accident,’ the necessary sums might be provided to the sufferers or their families. I have before me the prospectus of an insurance company of this kind, which undertakes for an annual premium of £2, 10s., or one shilling per week, to insure a sum of £1000 in case of death by accident, and a weekly allowance (limited to twelve weeks) in case of disablement. It is, however, expressly conditioned by this company that the insurer on these terms is not engaged in any occupation exposing him to unusual risk, and I should not be surprised if treble premiums were required to cover the special risks to which the miners and other workmen referred to in the passage quoted are exposed. Three shillings per week is a considerable sum for a working man to lay aside for life insurance, and that insurance, be it observed, limited to death or disablement by accident, for so the learned Judge has put it. Indeed, it may fairly be questioned whether the working classes are not better advised in subscribing, as almost all of them do, to such benefit societies as the Foresters and the Oddfellows, which give allowances proportionate to the subscriptions of members payable on death or sickness *from whatever cause*. But assume that the working class is in a position to protect itself by insurance, how wealthy that class must be if, by the surrender of a ‘trifling part’ of its income, it can accumulate a purchasing power which is assumed to be beyond the reach of the capitalist class. Can this be correct? Can it seriously be supposed that capitalists are to be ruined or driven out of the country by the very effort to provide for claims which the working classes can themselves insure out of the superfluity of their wages? It is generally understood that the sum annually paid in wages in this country bears but a small proportion to the interest of the fixed and floating capital embarked in trade.” This is certainly meeting the difficulty face to face, but still it cannot be denied that the workman’s side alone is too much looked to; we doubt what is stated as to the small proportion wages bear to capital, and we must remember that the surrender of even a trifling part of the income of the many means a very important element. It is the million who make every enterprise pay, not the specially favoured, however highly they may be charged for their advantages. Take for example the passengers in railways, or the visitors who go to the Crystal Palace, or, more familiar still, our penny post. The small contributions of the many will, as a rule, tell more, will go further, ay, and will produce a larger sum, than the heavy contributions of a more

limited body. It is not so unfair to conclude that capital may be seriously crippled by such a liability if imposed upon it, and if imposed without any means of lightening the weight of the burden. Nor, again, would it be just to compel employers alone to contribute to an insurance fund, whatever they might or may voluntarily do. It seems as if the mode suggested would scarcely meet the difficulty, but very recently, at a meeting of the National Association for the Promotion of Social Science, held in London, the idea thrown out by Lord Shand in his letter to the *Times* merely as one of insurance, without any distinct method, was more fully explained by the learned judge who presided, when an elaborate and able paper was read by Mr. Brown, Q.C., on the subject.

(To be continued.)

NOTES IN THE INNER HOUSE.

ALTHOUGH during the last few months there have not been many decisions of interest to the profession at large, perhaps not even the usual number, yet some points of considerable importance and interest have been settled. The case of the *Locality of Calton*, which was heard before the whole Court, and decided on January 12th, raised some questions of moment regarding Teinds; and the case of the *Locality of Springburn* on March 2nd was an important one in the same branch of our law.

In the *Locality of Calton* the majority of the whole Court (no less than five judges dissenting) held that lands which were part of the city of Glasgow, and were occupied entirely by streets, buildings, and their accessories, and whereof the teinds, moreover, were unvalued, were not exempted from the payment of teind, though no stipend had ever been localled on them, and though for seventy years they had not been included in the localities of the parish. The common agent proposed to include in the locality as at present depending the lands thus covered with buildings, and to place a value of £5 per acre upon them, taking that as the fair average value of such lands as were employed for agricultural purposes in the neighbourhood. The probable rent which these lands, if put to agricultural purposes, would have yielded must be taken, the Court said, as the basis of any calculation for ascertaining the amount of the teind, and for any scheme of localling stipend. The mode of occupation did not signify, it being observed that this decision was merely the carrying out of what was said in two former cases—*Glenlyon v. Clark* in 1842 (5 D. 69), and *Learmonth v. The City of Edinburgh* in 1859 (21 D. 890). In the first of these cases the lands were wholly in pasturage and had never been tilled, yet they were held subject to a valuation at one-fifth of the rent; no distinction was made between these pastoral lands and those wholly or partially agricultural, for all were deemed to fall under the Acts of 1633. In the second case the question was raised as to Brunts-

field Links and the Meadows, with the like result of their being liable if held to be teindable, though the various servitudes of golfing, bleaching, and walking might have prevented their use for agricultural purposes. Along with this question there naturally arose also in the *Calton* case a cognate point turning upon the interpretation of the Teind Valuation Acts. For the objectors it was maintained that these statutes had not enlarged the estate of teind, and that accordingly the rights of the titular were limited to one-fifth, not of the rent of all land whatever the mode of its occupation, but of the agricultural rent, if there were any such. This view was, however, rejected, and it has now been settled that, whereas before 1633 teinds comprised a tenth of the teindable produce, since that one-fifth of the rent forms the basis for estimating them. The broad question then which the *Locality of Calton* has settled may be said to be this—that lands because they cease to produce teindable fruits do not cease thereby to be teindable, and cannot consequently obtain exemption from payment of stipend in the final adjustment of a locality.

The second case in Teinds to which attention may be called was decided on 2nd March, and is reported as the *Locality of Springburn*. There the common agent had allocated a part of the stipend upon the Board of Police in Glasgow as proprietors of certain streets. The Police Board maintained that streets were not teindable subjects at all, but this question was not decided by the Court, for the case was decided upon the view that the Board of Police were not heritors, and could not therefore be properly localled upon. The Lord Justice-Clerk, however, at advising, indicated, without absolutely expressing an opinion, that streets were merely valuable as accesses to the properties adjoining them, and as such lent a value to those properties. Lord Ormidale added his opinion that in the amounts localled upon these properties the value of the accesses must necessarily have been considered. Reference having been made in the course of the debate to railways, it was also pointed out from the Bench that the former are entirely in a different position from public streets, and that the position was well illustrated by a comparison with roads in rural districts, which, though part of the subject let, are not included in teindable land.

The summons of poinding of the ground raised in the case of *Hervey*, May 16, has decided as regards feus that the composition payable on the entry of a singular successor is a *debitum fundi* where the feu-contract stipulates that such payments “should be declared real burdens.” It must accordingly be regarded not in the light of a collateral personal obligation, but as inherent in the reserved right of the superior, and therefore the sum due in such circumstances is properly recoverable by an action in this form.

Among the questions of process which have been recently raised may be cited that of *The Duke of Athole v. Robertson*, June 4, where it was laid down by the Lord President that the Court would grant

a warrant of citation against a witness having his ordinary residence in Scotland where there was merely the slightest suggestion of his having any material evidence to give. In the particular instance there was only a general allegation of condonation, but the warrant was granted. Again, in the case of *Sumner v. Middleton*, June 6, the Court, sitting as a Court of Exchequer, gave expenses against the Excise in a case irregularly stated for their opinion (7 & 8 Geo. IV. c. 53, § 84), the case being stated after judgment had been pronounced by the Justices at Quarter Sessions, and not *ex proprio motu* of that Court, but merely on the crave of the appellants, the Excise. In a petition (*Sdeuward*, June 5) the liquidator of a public company registered under the Companies Acts 1862 and 1867, and which was in course of being wound up voluntarily, obtained a decree to enforce certain calls he had made on the shareholders. The Court granted the prayer of the petition without making any order for intimation. This course is, we believe, not without precedent previously, but the occasions on which it has been adopted have been very few.

In *Gray v. Brown*, June 19, the Court inserted in an issue for trial of an action of damages for seduction these words: "Whether . . . the defender courted the pursuer, and professed honourable intentions towards her; and whether by means of such courtship and professions the defender seduced the pursuer," etc.

Our old friend "alimentary" has made his appearance again with the effect of maintaining his position absolutely intact. In *Duthie's Trustees*, June 5, a special case before the Second Division, an alimentary annuity was left to the testator's sister, with a liferent merely of the residue of his estate otherwise disposed of in fee. Subsequently, by codicil, the fee of the whole residue was given absolutely to the sister, but the alimentary annuity, it was decided, did not lapse by implied revocation, and the trustees were bound to secure it as directed over the heritable property before denuding in favour of the residuary legatee. It so happened that in the particular case the residue was a very large one, relatively at least to the amount of the annuity, but that does not impair the value of the protective word which by limiting the right secured to the annuitant absolutely as long as she lived this income, whatever misfortune might befall her as regards the rest of her means.

A very interesting question arose in *Barr v. Cochrane*, June 8. The proprietor of a landed estate let a farm to certain tenants on a lease whereby he bound himself to put certain houses, etc., into good and sufficient repair. A year afterwards he sold the estate, before he had executed these repairs, and the tenants called upon the purchaser to implement his predecessor's bargain; the seller thereupon admitted his liability, and obliged himself to carry out his undertaking with the tenants, but subsequently settled with them by a cash payment, and obtained a discharge from them. In these circumstances the purchaser raised an action against the

seller to compel him to execute or pay the expense of executing the repairs. The Court held, though with one dissentient voice, that the only creditors in the obligation were the tenants, and although the case was somewhat special, owing to an almost conclusive sentence in one of the purchaser's letters, that it was "not me, but Inch and Mark (the tenants), you must satisfy;" still, a part from that, it must be remembered that in the lease, upon which alone the whole claim could be based, these very stipulations were not on the lessor's but on the lessee's side, and could be enforced only by the latter. They having discharged their claim, it is not easy, as the Lord Ordinary observed in his note, to see that the purchaser could have any right to enforce this portion of the contract. It may be true that he would have been more benefited by the insistence of the tenants on the fulfilment of the bargain, still that in itself afforded no ground of action.

Yet another question as to repairs under a lease of land was decided in the case of *Barclay v. Nelson*, June 12, where a lease containing a clause declaring that additions and repairs on farm buildings should be executed in a manner to be approved by the lessor, was held to imply an obligation on his part to carry them out, although there was nothing in the lease obliging either lessor or lessee to execute the additions and repairs, nor any specification of what they were to include. A remit accordingly was made to a man of skill to report what it was necessary should be done.

The First Division have decided under the Poor Law Act (8 & 9 Vict. c. 83) the case of *Anderson*, June 12, in the following circumstances: A child received, in 1873, relief from the parish in which she was born and was at the time residing. Her father, an able-bodied man, had at the time no Scottish settlement, but was residing in an adjoining parish. This having come to the knowledge of the poor-law officials in the relieving parish, they gave the statutory notice in August 1874 to the parish where the pauper's father was residing, and where, shortly prior to the notice, he had acquired a settlement, claiming relief from them, though the father had not himself received aid, nor would have been entitled to receive it for his child. The father very soon after the notice had been given refused to take and maintain his child, though it was also admitted that the parish of his settlement had not taken any steps to remove the child or to maintain it. The relieving parish raised an action for repayment of the expense incurred by it for maintenance from the date of the statutory notice, and the Court held that the parish of the father's settlement was liable. It was pointed out, however, that the delicacy of the case turned upon the fact that the father was not an object himself of parish relief, and that properly the duty of maintenance fell upon him. Accordingly, the statutory notice having been given, the relieving parish was absolved from anything further, and the parish of the father's settlement, having him resident within its bounds and readily accessible,

should have taken steps to compel him to do his duty. The Act, moreover, gives the relieving parish an alternative in proceeding to recover what it has expended, either the parish of settlement or the parents being liable.

On Saturday, June 15, the Second Division decided a case (*Kidston v. McArthur & Co.*), which, although perhaps it may not have added much to our law, yet is interesting from the very circumstances by which the judgment was chiefly determined. The litigation arose out of a collision in the river Clyde between two steamers. One vessel had grounded right across the channel near to the side, and the other steamer attempted during the night to pass between the grounded vessel and the bank, and accordingly ran into and destroyed her. The point at issue was whether, in exhibiting as she did the single light directed by the Board of Trade Regulations (Art. 7) in the case of vessels "at anchor in roadsteads or fairways," the captain of the stranded steamer had sufficiently warned all comers of the true state of matters. The Court held that he had not done so, and that he had failed to take the precautions required in the special circumstances, thereby transgressing the instructions of another article of the Regulations (the 20th), and that, in point of fact, the crew of the approaching steamer were led to suppose that the light indicated merely the presence of a small boat riding at anchor. The case was, however, further complicated by the fact that the owners of the vessel damaged by the collision with the grounded ship proceeded, not merely against the owners of that ship, but also against the Clyde Trustees, whom they alleged to be bound by the various Acts, and by their own Regulations, to remove from the harbour any "wreck or obstruction" (Harbour, Docks, and Piers Clauses Act, 1847, sec. 56). It was said the trustees, by sending an official on board and taking precautions, had become responsible, all the more so as they were levying tolls for the very duty in question, and that the greater duty imposed by the Act—that of removal—included the lesser duty of properly lighting the vessel at night. The Judges, however, refused to give effect to these contentions; and it was pointed out that for one thing the Act cited against the trustees did not apply, as the place where the collision occurred was some miles from the harbour, docks, and piers of Glasgow, and also that the grounded vessel, which was expected to float at the next tide, was under the control of her own officers and crew. The trustees neither had exceeded the powers nor failed in their duties. It may be a long time before any similar question arises as to the lights to be exhibited by a grounded vessel, but the decision now pronounced is in accordance with what every one must think the means of safety; for, by employing only one light, it is impossible for the captain of any approaching ship to know the length or direction in which the obstacle may be placed as compared with his own vessel. It must, however, be remembered that even an anchored vessel,

unless, of course, anchored both fore and aft, will swing round with the tide, and be at certain hours for a short time at right angles to its normal position; and this consideration, coupled with what has occurred, may perhaps lead to a change in the Board of Trade Regulations, whereby all stationary vessels, whether anchored or aground, above a certain length, shall be required to exhibit *two* lights, one forward and the other at the stern, while smaller vessels within the limit of length might show *one* light amidships. Such a provision would enable an approaching vessel readily to judge of the amount of fairway clear, and so forth.

Reviews.

Report upon the Vital, Social, and Economic Statistics of Glasgow for 1877. By WM. WEST WATSON, F.S.S.

MR. WATSON, the City Chamberlain, has for many years issued valuable reports on the Social Statistics of Glasgow. Apart from local statistics, these reports contain so much of general character that we have for some years considered it proper to notice them. Statistics have generally a forbidding aspect; but Mr. Watson treats his subjects with an ardour and a love that have made them interesting to every reader. In place of a dry array of bare figures, he contrives to dress them with fancy, and occasionally with dry humour. As a specimen we quote his exordium for last year's Report, which gives a very graphic picture of the year 1877, now consigned to the past:—

"The passing away of the year 1877 is an event that will not leave behind it any amount of inconsolable regret if compared with the corresponding occurrence in any of many recent years. Commercial disasters at home and abroad; crippled manufacturing enterprise; a shipwrecking interest as well as a shipbuilding interest unsatisfactorily employed; a late and most disheartening harvest; and beyond all these, the wretched spectacle and the degrading influence of a meaningless, brutal, desolating war; these certainly are not the elements that conduce to suggest a record of pleasurable memories; and yet, as if this accumulation of distressing influences were insufficient to complete the weary burthen of each passing day, there has been artificially superadded, and largely within our own locality, what is euphemistically styled a contest between Capital and Labour; a contest with regard to which how many masters are there, and how infinitely more workmen are there, who, if the truth were boldly told, might very possibly, and yet with equal accuracy, describe it in language perhaps somewhat less elegant, although may be more expressive. Indeed, the only great redeeming feature seems to be—and it would be strange if there were no break in so thick a

Under each head-word or title appear in large capitals the subdivisions of the subject; but as the majority of cases, though belonging more particularly to one title, may be indirect authorities on many others, the compilers have prepared short rubrics, which form "cross references" under the different titles with which they have any indirect connection. Appended to each of these short rubrics is the reference to the title under which it will be found at full length. This is a most useful feature in the Digest, and will save a great deal of trouble in consulting the volume. The arrangement of the cases is generally chronological, but when two or more cases bear upon the same point they are put together, so that when the reader has found a case containing the point he wishes to find, he can rely on getting all the other cases containing exactly the same point immediately below without having to hunt further through the columns. In addition to the references to the authorized series of reports, the references to the *Scottish Jurist* are also given in every instance where the case was reported in that periodical. A selection of the cases which have been reported only in the *Scottish Law Reporter* for the last ten years has also been given, and adds much to the usefulness of the work. As regards the re-arrangement of the titles we must refer the reader to the preface, which contains an admirable exposition of the plan on which the Digest has been formed. We may mention as a specially useful feature, that when a decision is no longer directly applicable as a precedent in consequence of subsequent statutory enactment, attention has been directed to the fact by a note to the rubric or by quoting the section of the statute in the text.

We have said enough, we think, to show that this Digest is a great improvement on its predecessors. So far as we have examined the first part, it is conspicuous for the thorough way in which each title has been treated. We may notice the work more in detail when the remaining two numbers are published, which will be, we understand, in a few weeks; meanwhile we can congratulate the compilers on having produced a Digest which, for completeness of information and clearness of arrangement, is second to none.

Styles of Deeds and Instruments. Adapted from the Second Edition of the Styles of the late JOHN HENDRY, W.S. By JOHN T. MOWBRAY, LL.D., W.S. Edinburgh: Bell & Bradfute. 1878.

SINCE the last edition of Mr. Hendry's well-known Styles was published two Acts have been passed which have materially altered the provisions in reference to Land Rights. These were the "Titles to Land Consolidation (Scotland) Act, 1874," and the "Conveyancing Act" of the same year. Dr. Mowbray, keeping these important statutes in mind, as also the Registration of Leases Act of 1857, and the amendment on it of last year, has compiled a specimen of the various deeds which those Acts affect, which cannot but be of

the greatest service to the conveyancing practitioner. A short introduction states in a lucid and succinct way the solemnities which are now required in the execution of writs ; this is followed by a vast variety of deeds under the Acts above mentioned : so full and complete is the list that we are sure that the practitioner need never look in vain for what he wants on the subject. With such a guide as Dr. Mowbray, too, he may be perfectly certain that he will not be misled. There are also given some supplementary styles, including those of articles and conditions of roup of heritable subjects, and mandates for expediting services. The appendix contains the text *ad longam* of the different Acts referred to in the body of the book. The whole work exhibits an amount of painstaking and conscientious labour, which, along with the well-known erudition of the learned editor, makes it one which may be thoroughly depended on. It needs no words of ours to commend it to the profession ; to all in practice it will be found indispensable.

Obituary.

M. N. MACDONALD HUME, Esq., W.S.—We regret to have to announce the death of this venerable and highly respected member of the profession, which took place at his residence in Edinburgh on the 7th ult. In a notice of the deceased gentleman the *Edinburgh Courant* says :—

“Matthew Norman Macdonald was born early in the last decade of the eighteenth century, and was one of a family of sixteen, who were the children of the Laird of Scalpa, an island in the Hebrides, off the south-east coast of Skye. Dr. Johnson, in the course of his Highland wanderings, visited the island, and remained a night under the hospitable roof of the proprietor. Mrs. Macdonald, the wife of the old laird, is—or was till lately—remembered with feelings of great veneration and respect by a few of the inhabitants of the district. It was here that young Macdonald was born, and here he spent his youthful days, laying in a store of physical energy which stood him in good stead through life. He excelled in all many exercises, and few could boast of such an athletic frame. This being the case, it is no wonder that he looked forward to a military career, the more especially as all his brothers had entered the army as a profession. Acting, however, on the wishes and advice of his father, he assumed the pen instead of the sword ; and after spending some time at the universities of Aberdeen and Glasgow, came to Edinburgh, where he was admitted a member of the Society of Writers to the Signet in 1815. Unlike many men, to activity of body he united an equal amount of activity of mind, and for many years there was no man who worked harder in his profession. In 1846, however, a severe illness, in which his life was despaired of by some of the most eminent medical men of the day, warned him that such assiduous labour must be given up ; and from that time we believe he relinquished the practice of his profession. He entirely recovered from his serious illness, and lived till within a very recent time in perfect possession of health. For about two years previous to his death he suffered severely from neuralgia, which was borne with a fortitude and patience truly exemplary.

"In his character Mr. Macdonald united many of the best features of the Highland gentleman of the old school. Somewhat reserved in manner, it was not until one got below the surface that the noble and sterling heart of the man was found. Simple and unostentatious, the amount of good which he has done during his life will probably never, in this world, be known, but many will feel that in his death they have lost a true and faithful friend and helper. More especially will his loss be felt by the congregation of the Catholic Apostolic Church, of which he was from its first formation a steady and influential adherent and office-bearer. In him, too, the Society of Writers to the Signet loses its oldest member, and the same may be said of the Royal Company of Archers, which body he joined in 1813. Though not of late years ever seen at Archers' Hall, he was when young a regular attendant there, and an excellent shot. He was also a member of the Mid-Lothian Yeomanry, and carried the colours of the regiment upon the occasion of the visit of George IV. to Edinburgh in 1822. His handsome figure and manly bearing—accustomed as he had been to riding all his life—attracted particular attention on that day, as some, perhaps, but, alas, how few! may still remember.

"Although during his long life he never took any very prominent part in public questions or politics, Mr. Macdonald was throughout a strong Conservative. He was more than usually well informed in all matters pertaining to literature and art, and we will venture to say that few men have read more than he did. Up to the end of his life he retained his fondness for books, and the information thus acquired, together with the reminiscences of his own long life, rendered him a companion such as is rarely met with.

"The deceased gentleman was thrice married. First, early in life, to Miss Finnan, who died about 1828; then in 1831 to Miss Grace Hay of Hayston, who died in 1836; and in 1843 he married Miss Agnes Hume, a daughter of Baron Hume. On this lady succeeding her sister in the property of Ninewells, Mr. Macdonald assumed the name of Hume in addition to his own. It may be also mentioned that through Miss Hume he got the collection of pictures which belonged to her father. The collection remains unbroken, and contains some very valuable specimens of art.

"Mr. Macdonald is survived by several of his family. His eldest son by his second wife is Lieutenant-Colonel of the 5th Fusiliers, and the youngest son by the same marriage is the present Solicitor-General of Scotland.

"Thus has passed away a life full of fragrant memories and recollections of the past. It was the life of one who was the representative of a school now fast passing away, and of which we in our day will never see the like. The qualities which he possessed may not be extinct, but amidst the changed conditions of life it is rare indeed to find them united in one individual. Of vulgar fame and renown he had indeed none, but his name and deeds of kindness will be remembered in many a heart long after the streets of this city, in which for so long a time he had his home, will have forgotten the figure of that noble old Highland gentleman who has now gone to his rest."

The Month.

THE GOVERNMENT AND THE COURT OF SESSION.

It is the law of the land that there shall be four Judges in each Division of the Court of Session, and a Depute-Clerk attached to each Lord Ordinary in the Outer House; and yet the Second

Division has for a year and a half numbered only three Judges, and Lord Craighill's Court has for two months been without a Depute-Clerk. This simple statement discloses a plain abuse; either the law is wrong and ought at once to be altered, or it is right and ought at once to be obeyed. Government, as the principal law-maker, ought to be the last law-breaker, and it is Government that is the culprit here.

We do not propose to enter on the vexed question whether there is room for a reduction in the number of Supreme Judges in Scotland. We should certainly have thought that a longer experience of the great reform in judicial procedure which took place in 1868 was required before any such question could be fairly determined. But allowing, for the sake of argument, that one or even two Judges might be struck off without detriment to the public service, it is surely not in the Inner House that the operation should be performed. The work of the Inner House has been greatly increased by recent legislation, and at present it is the part of the judicial machinery which is working up to its fullest power. Moreover, the Law Courts Commission in 1870 strongly reported in favour of a division of four Judges, and we have never heard any answer to the arguments then used. On the contrary, recent experience has only served to confirm them. It has happened on more than one occasion that the opinion of a dissentient Judge in the Second Division, agreeing with the Lord Ordinary, has been set up by the House of Lords; and it is always to be remembered that the Inner House, being a Court of Intermediate Appeal, ought to be constituted on the footing that cases are not to go beyond it. The vast majority of cases do not go beyond it, and nothing can be more unsatisfactory than that an unsuccessful litigant should have it in his power to say that as many Judges were in his favour as were against him, although, from purely accidental arrangements, the opinion of the two who were against him became the judgment of the Court. It is no disparagement to the learned Judges who constitute the Second Division to say that the present arrangement is necessarily bad. Indeed, their Lordships are among the readiest to acknowledge it; and we must express our entire concurrence in the observations which the Lord Justice-Clerk thought it his duty

to make from the bench a short time ago. Even if every judgment were unanimous, the arrangement would be open to objection. Suitors in that Division are entitled to the opinion of four Judges, and they only get the opinion of three. If one Judge is in any way disabled, the Division becomes powerless to act without calling in a Judge from the Outer House. And, as Lord Moncreiff pointed out, the Division is prevented by its reduced strength from making due provision for the taking of proofs, which is one of the duties imposed upon it by recent legislation.

We are aware that Government when lately questioned on the subject intimated that the question of reducing the judicial staff was under consideration. But how long is the process of "consideration" to last? A year and a half is surely ample time for a Home Secretary with an inquiring mind to come to a decision, not to mention such aids as a Royal Commission Report in his desk, and a Lord Advocate at his elbow to refer to. There is an old Scottish proverb which says, "Better a finger aff than aye waggin'"; and for our own part we should prefer that

"Consideration like an angel came
And whipped the offending Adam out of us"

than that it should take the form of simple delay and indifference. We have now reached a period of the session when new legislation is impossible, and, therefore, before anything can be done, this illegal vacancy will have lasted for two years and a half. Might it not be worth while for the Government still to obey the law as it is, and leave the question of what the law ought to be for future consideration?

With regard to the vacancy in the Depute-Clerkship, we can hardly suppose that any new experiments can be in contemplation, and therefore the delay in making the appointment must be a piece of pure official bungling. From what we have heard, there can be no dearth of candidates; and though this may make the task of selection very embarrassing, it is surely a difficulty capable of solution in less than two months. We cannot suppose for a moment that the Lord Advocate is to blame. He knows the office and the candidates, and half an hour

would enable him to come to a decision which would be perfectly satisfactory to the public. But of late years there has grown up a vicious system of canvassing in all directions for every office under the sun, so that the men who really understand the requirements of the post are perplexed by applications from influential people, and people who think themselves influential, on behalf of this or that constituent, or cousin of a constituent, or of some one who has all his life accorded a hearty, if silent, support to the great principles of the party in power. No system could be less likely to conduce to an efficient exercise of patronage, and leading men would do a real public service by discountenancing all such touting. In the meantime, whatever be the cause, Lord Craighill is without a clerk, and we must say that we think his Lordship was amply justified in the wail with which he announced the other day that he must henceforth rise at half-past one o'clock. It certainly seems that Government as well as the Christian people would be all the better of a *jus devolutum* to act as a check on undue delays in filling up vacancies.

A further anomaly is to be found in the present arrangements as to the office of Principal Clerk of Session. It may be that there is no absolute necessity for having more than one Principal Clerk in each Division, but if so, the office ought to be regulated, and the duties of Principal and Assistant Clerks defined by Act of Parliament. The present arrangement is purely provisional, and no provisional arrangement ought to last so long as this.

The whole attitude of Government towards the Court of Session is calculated to detract from its just influence and authority. Already there is too great a tendency throughout Scotland to show a paltry jealousy of a national institution because it is also of necessity an Edinburgh institution. If Scotsmen will insist in being jealous of their own capital, they must submit to the alternative of centralization in London. But so long as Scotland has a law of its own, that law must be administered by a Scottish Supreme Court, and no Supreme Court in Scotland can have its headquarters anywhere but in Edinburgh. It is the duty therefore of the Government loyally to support and strengthen the Court of Session, and not to flout it in the eyes of the country by habitual

neglect. One thing is perfectly certain, that the evils of which we complain would in no way be remedied by the proposal—happily abortive in the meantime—to set up a Scottish Under-Secretary. All that pertains to the regulations of the national tribunals falls clearly within the province of the Lord Advocate, and if he and the Home Secretary between them are not fit to decide on the proper number of Judges and clerks, their deliberations are not likely to be materially aided by calling in a lay subordinate. This notable proposal is only another instance of the airy indifference with which Scottish affairs are apt to be treated in Downing Street. We do not complain of the present Government in particular; it was the same with their predecessors. Lord Aberdare and Lord Young began the pernicious system of keeping offices open without lawful warrant or reasonable excuse, until, in some cases, it suited their own convenience to fill them up. But we are sorry to see Mr. Cross, an able man, and in some respects a successful minister, taking a leaf out of the book of his opponents. Let him beware of incurring the personal odium which befell some of the members of Mr. Gladstone's Government. It is the Nemesis of a meddling aggressive spirit, a contempt for the sentiments and the sympathies of others, and an undue love of power. We are bound to say that Mr. Cross has shown some symptoms of these failings, particularly in his dealings with Scotland. He has greatly encroached on the functions of the Lord Advocate, and when he found himself overweighted with details in which he ought never to have taken any part, he has proposed still further to efface the office by handing over the higher Scottish business to an underling of his own. We should look for better results from his promised visit if he had not coupled it with the unfortunate intimation that his own mind was made up. We cannot say that we admire the tone of his reply to Sir George Campbell the other night, when he indicated that the whole subject of judicial arrangements in Scotland was of such trifling importance that he could not promise to deal with it even next session. But if he will only take the trouble to ascertain the real sentiments of the people of Scotland, we venture to think he will not find them in favour either of his mode of exercising tronage in the past, or of his scheme for conducting affairs in

the future. They are content that the office of Lord Advocate shall retain its ancient political functions, but they desire to see the office get fair play, and they do not desire to see the administration of Scottish affairs handed over to an official in Downing Street with the status of an under-strapper and the salary of a Sheriff-Clerk.

Monsieur Rolin Jacquemyns.—We should expose ourselves to the reproach of being *incuriosi nostrorum* were we to omit to notice a fact so gratifying as the elevation of one of our own graduates, hitherto known to fame chiefly as a scientific jurist, to the dignity of a Minister of State. Such an occurrence would as yet be impossible in this country. But they manage matters otherwise abroad; and in entering the Belgian Cabinet as Minister of the Interior, M. Rolin Jacquemyns follows in the footsteps of his own father, the now venerable M. Rolin, and of his colleague of the Institute of International Law, M. Macini, the present Minister of Justice in Italy.

If not the originator, M. Rolin Jacquemyns was certainly the prime mover in the foundation of the Institute of International Law in 1873; and to his unwearied exertions in the capacity of its general Secretary, to the consideration and courtesy which he has invariably exhibited to its members, and to his own personal contributions to its labours, it owes in no small measure the dignified position which, during its short existence, it has so unobtrusively vindicated for itself amongst the learned societies of Europe. But it has been as chief editor and as a constant contributor to the *Revue de Droit International*, ever since its foundation in 1869, that M. Rolin Jacquemyns' exertions in the cause of scientific jurisprudence have been most conspicuous; and it is interesting to know that it was in this capacity that he attracted the attention of the leaders of the Liberal party in Belgium, who only waited for the success which they have attained in the recent elections to enrol him in their ranks.

Monsieur Rolin's wide culture and varied accomplishments peculiarly fitted him to be the editor of a review which was to embrace the legal literature of the whole civilized world. Knowing, as he does, all languages, in whatever language an article might be written, if he judged it worthy of insertion on scientific grounds, it was certain to appear in a French garb, the perfect adjustment of which it often owed to his own editorial hands. How a man so busy could undertake the tedious and irksome task of translation has often surprised us. But such was by no means the only or the highest use to which M. Rolin turned his linguistic accomplishments. One of the most important departments of the review has always been that devoted to *Bibliographie*. To this department M. Rolin Jacquemyns has been himself by far the most

valuable contributor; and not contented with the instruction of his readers, he has been careful to gratify their legitimate curiosity in a manner of which few would have been capable. Quite recently, for example, he gave us an elaborate and exhaustive account of the jural literature of Spain and of modern Greece, and showed that in both cases it was more important than most of us supposed.

The continuance of these multifarious labours, together with the prodigious foreign correspondence which they involved, has, in M. Rolin Jacquemyns' present position, of course become impossible. He is to be succeeded, we believe, in the Review, and probably in the Institute, by M. Alphonse Rivier, Professor of International Law in the University of Brussels. No more suitable appointment, we believe, could be made; but it will be no easy task to fill the rôle which M. Rolin had assigned to himself, and not being Belgians, we shall not grieve overmuch should any turn of the political wheel, as fickle as that of fortune, restore him to science. In the meantime we must rejoice that in him science and practice will go hand in hand, and that as a legislator he will give no heed to the brainless empiricism which in England often threatens to banish reason from the conduct of affairs.

Professor Lorimer on the Scottish Bar.—The learned Professor has addressed the following letter on this subject to the *Scotsman*:—

“1 BRUNTSFIELD CRESCENT, July 17, 1878.

“SIR,—An addition to the bar of nine members in eight days, which has just taken place, is a social phenomenon too important to pass without notice in your columns. Nor is this all. The whole number for the year, I am told, is expected to be fourteen—the average for many years past having been eight. I do not profess to explain a manifestation of vitality so unequivocal in a body the decay of which was supposed by many to be a fact as incontrovertible as that of the Ottoman Empire. There is one explanation, however, which I can foresee will be given of it—not quite unwillingly, I fear, by those to whom, in its palmy days, it was an object of envy—I can at once put aside. The bar, they will say, has become democratic—it can no longer lay claim to the exceptional advantages either in the culture or social position of its members which it owed to its exclusiveness, and hence the increase in its members. The gain in quantity has been purchased at the sacrifice of those special qualities to which in former times so much value was attached. Now I can state emphatically, as matter of personal knowledge, that such an explanation would be wholly at variance with the truth. Whether we adopt intellectual or social tests, whether we take learning or refinement as our measure of value, the bar never received during the long period I have known it more valuable accessions to its ranks than in the young gentlemen who have joined it at present and during the last few years. So thoroughly, indeed, am I persuaded of this fact, that, with all the respect which I feel for the rapidly-thinning ranks of my seniors, and with all the natural clinging which I have to those who are of my own age or my immediate juniors, I do not hesitate to state it as my opinion that much of the best blood and brains and culture at the bar will be found amongst the men under ten years' standing. But if all this be true, even those of your readers who hear it gladly may not unnaturally shake their heads when a brilliant future is predicted for the bar. The practice of the Court of Session, they will say, is falling off; the number of Judgeships and sheriffships is being diminished; the office of Lord Advocate is in danger of

being shorn of its political importance, and that of Lord Clerk Register is threatened with abolition, or, what is pretty much the same, with being transferred to London. What, then, are all those gifted and accomplished young fellows to do? What a prodigious waste of talent and energy must be going on in the Parliament House, and how many of those men whom you now regard as so promising, if no change for the better should occur in their prospects, must run utterly to seed. It is sadly too true; and the fact, I think, points clearly to the necessity of the bar vindicating for itself a wider field of activity than it has hitherto enjoyed, or than can now possibly be furnished to it by the practice of the law. The bar, meaning thereby the highest branch of the legal profession, must develop in this country, as it has done elsewhere, a political and official as well as a legal side, and our University teaching must be so expanded and adjusted as to prepare a class of specialists for this new sphere. To explain how this is effected in continental countries would involve an unjustifiable encroachment on your space. All that I can do for the present is to call the attention of your readers to a series of papers in the *Journal of Jurisprudence*, in which this is being done very fully by my friend and colleague Professor Mackay; and to the first article in the last number of that periodical, which is devoted to the subject. In urging the adoption of the course which I have here indicated, it will be seen from the information contained in Professor Mackay's articles that the writer, far from proposing a novelty, is only suggesting that this country should do what the rest of the civilized world has done already.—I am, etc.

J. LORIMER."

Law Clerks' Institute.—We have received the following regulations for the Constitution of a proposed Institute for Law Clerks and Students of Law in Edinburgh. We wonder that something of the kind has not been started ere this, as in almost every town of any size in England the Law Clerks have their Association and Debating Society. We do not observe the latter feature mentioned in the Articles of Constitution, but we hope a good Debating Society will be started in connection with the Institute. We wish the proposed scheme every success, and have only to add that subscriptions in aid of it will be gladly received by Mr. George Dalziel, W.S., 5 Thistle Street, Edinburgh:—

"CONSTITUTION.

"I. The name of the Institute shall be THE LAW CLERKS' INSTITUTE.

"II. The object of the Institute shall be to provide a CONSULTING, LAW, AND GENERAL LIBRARY, WITH STUDY, WRITING, AND NEWS ROOMS.

"III. The whole Funds and Property belonging to the Institute shall be vested in eight Trustees, the majority to be a quorum. The original Trustees shall be—JAMES HOPE, D.K.S.; JOHN C. BRODIE, W.S.; JAMES STUART TYTLER, W.S.; DAVID DOVE, S.S.C.; JOHN CARMENT, S.S.C.; CHARLES PEARSON, C.A.; GEORGE AULDJO JAMIESON, C.A.; JOHN BOYD BAXTER, Solicitor, Dundee. On the death or resignation of a Trustee or Trustees, the General Committee after mentioned shall have power to elect a new Trustee or Trustees.

"IV. The Membership of the Institute shall consist of *bona fide* Clerks and Apprentices of any enrolled Law Agent in Scotland or Chartered Accountant in Edinburgh, of Advocates' Clerks, and of Students attending any of the Law Classes in the University of Edinburgh.

"V. The Membership shall be limited to 500 at first, and each Member shall pay an Annual Subscription of 10s. 6d. The General Committee after mentioned shall have the sole power to admit Members, and they shall be entitled to call for such evidence that an Applicant is eligible for admission as

they may think advisable. They shall also have power to increase the number of Members, or alter the Annual Subscription, in such manner as they may deem proper.

"VI. The Institute shall be under the direction of a General Committee, which shall consist of two Members of each of the W.S., S.S.C., and C.A. Societies in Edinburgh, two Law Agents, qualified under the Act 36 & 37 Vict. c. 63, and five Members of the Institute. The first General Committee shall be appointed by the Trustees, and shall continue in office until 1st June 1879. The subsequent General Committees shall be elected annually in the following manner, viz.:—Each of the foresaid Societies shall, on or before the first Monday in June, appoint two of their Members, and the Members of the Institute shall appoint five of their number to act on the Committee for the ensuing year, and the Members of Committee thus chosen shall meet on the first Tuesday in June and nominate two Law Agents, qualified as aforesaid, to act as Members of said General Committee along with themselves. In the event of any of the foresaid Societies failing in any year to appoint Members of Committee, or in the event of any Member of Committee dying or resigning during a year, the Trustees shall make such appointment as may be necessary to fill the vacancy.

"VII. Five Members of the General Committee shall form a quorum, and the Chairman for the time being shall have a casting vote.

"VIII. The General Committee shall meet at such time or times as they may determine, and shall have power to appoint Sub-Committees of their own number for specific purposes; and also to appoint and dismiss from time to time such officials and servants of the Institute as they may deem proper.

"IX. The General Committee shall make up Accounts annually, and submit the same to the Trustees, with a Vidimus showing the whole assets and liabilities of the Institute.

"X. The General Committee shall have power to open Dining-Rooms in connection with the Institute, for the convenience of Members, whenever they deem it expedient to do so.

"XI. The General Committee shall frame, and may from time to time alter as they may think proper, the Rules and Regulations necessary for the conduct of the Institute.

"XII. The General Committee shall have full power to enforce said Rules and Regulations, and, whenever they see cause, to deprive any Member of the privileges of the Institute, the Annual Subscription in such case being forfeited.

"XIII. The General Committee shall have power, with consent of the Trustees, to make such alterations from time to time on the Constitution of the Institute as they may think proper."

Box Days—Autumn Vacation.—The Lords have appointed THURSDAY, 25th August, and THURSDAY, 19th September, to be the box-days in the ensuing vacation.

Bill Chamber Rotation of Judges.—The following is the Roster for the ensuing vacation:—

Monday, July 22, to Saturday, July 27,	LORD RUTHERFURD CLARK.
" July 29, to "	Aug. 10, " CURRIEHILL.
" Aug. 12, to "	Aug. 24, " ORMDALE.
" Aug. 26, to "	Sept. 7, " GIFFORD.
" Sept. 9, to "	Sept. 21, " SHAND.
" Sept. 23, to "	Oct. 5, " RUTHERFURD CLARK.
" Oct. 7, to meeting of Court,	" CURRIEHILL.

The LORD ORDINARY on the Bills will sit in Court on WEDNESDAY, 28th August, and Wednesday, 25th September, each day at 11 o'clock, for the disposal of motions and other business falling under the 93rd section of the "Court of Session Act, 1868," and rolls will be taken up on MONDAY, 26th August, and MONDAY, 23rd September, between the hours of 11 and 12 o'clock.

Autumn Circuits.—The following are the dates fixed for the different district circuits in Scotland:—

SOUTH.

Lord MONCREIFF (Lord JUSTICE-CLERK) and
Lord YOUNG.

Jedburgh—Tuesday, 3rd September.

Dumfries—Friday, 6th September.

Ayr—Tuesday, 10th September.

NORTH.

Lords DEAS and MURE.

Dundee—Tuesday, 3rd September.

Perth—Friday, 6th September.

Aberdeen—Tuesday, 10th September.

Inverness—Friday, 13th September.

WEST.

Lords CRAIGHILL and ADAM.

Glasgow—Tuesday, 3rd September.

Inverary—Tuesday, 10th September, at 2 o'clock.

Stirling—Friday, 13th September.

Calls to the Bar.—The following gentlemen have been admitted members of the Faculty of Advocates:—ALBERT PITOT, HECTOR W. MACLEOD, GEORGE LEWIS MACFARLANE, DAVID DUNDAS, WILLIAM SHIRRES, JOHN HOUBLON FORBES, GEORGE WATT, HENRY KERMACK, JOHN DAVID SYM, WILLIAM CAMPBELL.

ERRATA.

In article "On the Supposed Decline of the Scottish Bar," p. 340, line 7 from bottom, delete "not."

In article "On Education for the Service of the State," p. 350, line 21 from bottom, for "impress on" read "increase in;" line 10 from bottom, for "science" read "service;" line 4 from bottom, for "duties" read "studies."

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF CAITHNESS.

Sheriffs RUSSELL and THOMAS.

MANSON v. SINCLAIR.

The circumstances of this case appear from the interlocutors:—

"*Wick*, 23rd November 1877.—The Sheriff-Substitute having considered the

petition, with the writings produced, proof adduced, heard parties' procurators, and advised the cause: Finds that at the market held at Georgemas Hill in the month of August 1876 a verbal agreement was entered into between the pursuer and James Henderson, farmer, Olgrinmore, by which it was arranged that the pursuer should winter with Henderson one hundred wedder Cheviot lambs at nine shillings per head, the lambs to be sent from Shetland to Caithness in the month of September following: Finds that the defender, who was present at the market, was requested by the pursuer to take delivery of the lambs on their arrival at Wick by steamer, and have them sent to Henderson, but that he declined or refused to do so: Finds that the said lambs were shipped at Lerwick for transmission to Henderson by the St. Magnus steamer leaving that port on 12th September, and that they arrived at Wick on the following day and were landed there: Finds that they were taken delivery of by the defender, or those acting on his behalf, as being sheep, the property of Zachary Macaulay Hamilton, farmer, Symbister, Shetland, for whom the defender acted as an agent or commission salesman, and that after being kept at Wick by the defender for some days, they were shipped by him to John Murray & Tod, sheep and cattle agents, Edinburgh, by whom they were sold, and the price accounted for by them to the defender: Finds the defender liable to the pursuer in the sum of £75 sterling, being at the rate of 15s. a head, together with the sum of £12, 10s. 5d., being freightage, custom keep, and commission, in all £87, 10s. 5d. sterling, and in the whole circumstances finds no expenses due to either party, and decerns. Two figures delete before subscription.

HAMILTON RUSSELL.

"*Note.*—The only difficulty that presented itself to the mind of the Sheriff-Substitute was as to the value of the lambs, or otherwise, the price to be paid by the defender to the pursuer. It has been satisfactorily proved that in the year 1876 the value of sheep, owing to the scarcity of pasturage, was very much deteriorated from what it had previously been. It has also, in the opinion of the Sheriff-Substitute, been proved that the stock in question was not of a very good quality (see evidence of George Watson, p. 18; James Nicol, p. 30, D. E., and production No. 10 of process). On this question of value the Sheriff-Substitute was desirous that the decision of some practical man should be obtained, but to this the pursuer would not agree, though the defender was willing that the matter should be settled by arbitration. The Sheriff-Substitute considers that the case was eminently one for settlement by jury, and not for a court of law. In view of the price obtained in 1876 for the class of stock involved in this action, and taking into account the loss sustained by the pursuer, 15s. per lamb is not considered by the Sheriff-Substitute to be an unreasonable sum, and he has therefore fixed upon that amount to be paid by the defender.

"In the circumstances of the case the Sheriff-Substitute has arrived at the conclusion that the pursuer has not made out a sufficient claim for consequential damages, the defender having made no profit whatever by the sale, and having in reference to it, and in fact in the whole matter, acted in *bona fide*. There can be no doubt that the defender committed an error in having sent the sheep to Edinburgh for sale. He alleges that the advice of the transmission of the lambs to him by the pursuer did not reach him until after they had been so sent south, and it is a matter of regret that the envelope of the letter was not preserved, as it would *per se* have shown whether or not this allegation was correct. Be this as it may, no advice card (as is usual in such cases) was sent by the pursuer with the sheep, and to this omission on his part the mistake committed by the defender is partly attributable.

"In regard to the matter of expenses, the Sheriff-Substitute considers that as the defender, prior to the raising of the action, was anxious, willing, and made offer to indemnify the pursuer for any loss he might have sustained, such loss to be ascertained and settled by arbitration (by which process considerable delay and expense would have been avoided), and in view of the fact above

stated, that the pursuer himself to some extent contributed to the state of matters brought about, it would be an injustice to saddle either party with the whole expenses of the action, which he cannot but think have been needlessly incurred, and he has found accordingly. H. R."

The pursuer appealed to the Sheriff, who opened up the record, as the proof had been allowed to embrace a much wider case than that disclosed on record. After a renewed adjustment of the record and the ascertainment of some necessary facts by a joint minute of admissions, the Sheriff has pronounced the following interlocutor :—

"*Wick, 9th April 1878.*—The Sheriff having resumed consideration of the pursuer's appeal and whole process, Finds (in addition to the findings in the Sheriff-Substitute's interlocutor) : (1) That the sale of the lambs in question by John Murray & Tod in Edinburgh took place on 27th September 1876 ; (2) That prior to 27th September 1876 the defender came to full knowledge of the fact that the lambs so sent off to Edinburgh to be sold were not the property of Zachary Macaulay Hamilton, but were the property of the pursuer, and that he had committed an error or mistake in regard to the pursuer's lambs ; (3) That thereupon it became the defender's duty to telegraph to the salesman, or to take other means for preventing the said sale, and also to communicate with the pursuer by telegraph or otherwise, so as to obtain any instructions he might have been inclined to give ; (4) That the defender failed to do this, and thus became guilty of wilful default and gross negligence in the premises, and in consequence is liable to the pursuer in the loss, injury, and damage flowing therefrom ; and (5) That the pursuer has suffered such loss, injury, and damage to the extent of £127, 6s. 8d. sterling, as at, say, 31st March 1877 : Therefore decerns and ordains the defender to make payment to the pursuer of the said sum of £127, 6s. 8d. sterling, with interest thereof at five per cent. per annum from and after 31st March 1877, until paid : Finds the defender liable to the pursuer in two-thirds of the expenses incurred by the pursuer in this process, as the same may be taxed : To the extent of giving effect to the above findings and decerniture, sustains the pursuer's appeal and the defender's motion for review under section 29 of the Sheriff Court Act, 1876, and alters the interlocutor submitted to review, and *quoad ultra* dismisses said appeal and motion, and adheres to the interlocutor submitted to review, and decerns. GEO. H. THOMS.

"*Note.*—The Sheriff agrees with the Sheriff-Substitute that the pursuer has failed to substantiate his original case against the defender as laid on contract ; but the case, as now presented, raises the question for what fault and to what extent a person assuming gratuitously the management of another person's concerns—a *negotiorum gestor*—is liable. Fault to render the defender liable must be in this case, the Sheriff thinks, what is known in our law as *culpa lata*, and not any other kind of error or mistake (Bell's *Prins.* § 541). It is appropriately enough paraphrased in the record as wilful default or gross negligence. Such, it is now alleged, against the defender, occurred on three occasions : first on receipt of the lambs on 13th September 1876 ; secondly, by sending them for sale to Edinburgh on 19th September 1876 ; and thirdly, by not countermanding the sale or getting the pursuer's instructions what to do with the lambs between 19th and 27th September, on the latter of which days the lambs were sold in Edinburgh, under instructions sent off by the defender on 19th September. The Sheriff agrees with the Sheriff-Substitute that no error or mistake such as to render the defender liable occurred on 13th September 1876, when he received the pursuer's lambs.

"There is more difficulty in absolving the defender from gross negligence and wilful default on the second occasion alleged. There is, however, a doubt as to his receipt of the pursuer's letter (29 of process) before the lambs were sent off on 19th September. The Sheriff—stretching a point—gives the defender the benefit of this doubt.

"But the Sheriff has no doubt as to the defender having been guilty of gross negligence and wilful default in not countermanding the sale of the lambs (which took place on 27th September), after 21st September, when he must have received both the pursuer's letter (29 of process) and Mr. Hamilton's telegram (24 of process). He ought also to have telegraphed for the pursuer's instructions in the circumstances brought about by his own mistakes. That the defender did neither of these two things is admitted by him on record as well as at the proof.

"The extent of the defender's liability for this gross negligence and wilful default on his part has been difficult to fix. The pursuer had taken grass to winter the lambs sold at a rent of £45, which he has paid to the extent of £33, 15s., that sum having been accepted in full of the £45 per receipt No. 52 of process. He would, however, have paid this £45 to bring his lambs up to their spring value, and the unpaid balance of it will fall to be deducted from the estimate of the spring value of the lambs, which the Sheriff makes as under mentioned.

"The lambs not being intended for sale, brought only £47, 8s. 1d. But the value to the pursuer is not to be measured by this forced sale. A greater value is not only attested by his taking Caithness pasture for them, but by the evidence of Shetlanders who pursue the same system of feeding lambs. Lord Londonderry's Shetland manager says that in the succeeding spring, when the pursuer's lambs would have returned to Zetland, such lambs were worth in Zetland 35s. to 38s.; and Mr. Hamilton, manager of the sheep grazings of Garth, etc., says that the pursuer's lambs which he saw would, if sold in Zetland in spring of 1877, have brought 36s. Both of these are pursuer's witnesses. Henderson of Olgrinmore sold in Caithness, in June 1876, some lambs he had wintered at 22s., but he adds, "In June the price was low." Mr. Young, manager of Dunbeath, paid in Caithness, in April 1877, 29s., and adds that the deaths in that winter were two to a score. Mr. Nicol of Wick, who is one of the defender's witnesses, says that in Caithness 'they would be worth about 25s. a head in March following' (1877). 'I mean 25s. for those which would be alive in March.' These three last estimates are exclusive of the additional value from Zetland acclimatization, which Mr. Hamilton (and in this he is uncontradicted by any witness) states at 5s. a head. The pursuer says 'the cost of the sheep, of freight to and from Wick, of dipping and driving the sheep, amounts to 31s. 2d. when returned to my farm.' This is exclusive of the wintering, which at £45 for 100 is 5d. a head, equal to 31s. 7d. But the pursuer further says, and he is confirmed in this by Messrs. Meiklejohn & Hamilton, 'They are worth much more to me as farm stock, which had been well selected off healthy ground, and which were to be wintered on healthy ground.' The Sheriff, on the whole evidence, and looking to the defender's obligation to the pursuer, fixes the average value of the pursuer's lambs in the spring of 1877 at 32s. each, which for 100 is £160, but allowing for deaths two to the score, that is, ten deaths, gives a result of £144. The winter of 1876-7 being a severe one in Caithness (Henderson of Olgrinmore lost a score before the new year), the pursuer would have been exposed to its risks, and these must be estimated in any attempt to assess his damage.

"From the value of the lambs, as thus fixed in the spring of 1877 at £144, there has to be deducted the sum of £11, 5s., being the unpaid balance of the rent of the winter grazing, £45, leaving £132, 15s. But this £132, 15s. is further subject to the carriage of the lambs back to Zetland, which the Sheriff assumes would be the same as paid for their carriage to Wick, £5, 8s. 4d. (per No. 63 of process). Deducting this sum of £5, 8s. 4d., the amount of damage in which the defender is liable to the pursuer is £127, 6s. 8d. The Sheriff-Substitute's finding neither party entitled to expenses relates to the case as presented to him, and no doubt can be entertained that the pursuer had failed in his case so far as laid on contract, and as regards gross negligence or wilful default previous to 18th or 19th September 1876. But in the case as now presented the pursuer has been successful, and the defender has failed in his

contention that there was no gross negligence or wilful default subsequent to 19th September 1876. The justice of the case, looking to the pursuer's mixed success and failure, the Sheriff thinks is met by his finding the pursuer entitled to two-thirds of his expenses in the process. G. H. T."

PERTH SMALL DEBT COURT.

Sheriff BARCLAY.

A. V. B.

"*Perth, 28th June 1878.*—The summons is grounded on a double charge in the following terms: 'To loss and damage sustained by the pursuer, and as a solatium to his feelings in consequence of the defender, on the 22nd day of May 1878, at or near Springfield Hill, on the estate of Bonhard, in the parish of Scone, having illegally and unwarrantably assaulted the pursuer by throwing him to the ground, pressing his knees upon his body, seizing him by the throat, and rifling his pockets, to the great injury of his person and danger of life, £8. To value of single-barrel gun, powder flask, and shot bag, forcibly and illegally taken from the pursuer by the defender on said 22nd May 1878, £4. In all £12.' The facts, according to the defender's own statements, are as follows: He, a young gentleman, had recently gone to reside on his property of Bonhard. On the evening of the 22nd May he was walking on his lands of Springfield. He came on the pursuer, who is an aged man, and was pointing a gun towards some whin bushes in which a sporting dog was working. Unfortunately, neither the parties knew each other. The defender asked what pursuer was doing there. He answered he had been working at some place in the neighbourhood, and was on his way home to Perth. The defender asked his name, on which he admittedly gave a false name and place of residence; but which the defender, not knowing the man, did not know at the time to be false. The defender then asked his gun, which the pursuer refused to surrender, and thereon the defender ordered the pursuer to accompany him to the neighbouring farm with the intention of his getting his identity ascertained. The defender laid hold of the pursuer, and tripping him brought him to the ground, the pursuer still grasping the gun with both hands. The defender then fired off the gun, which was loaded, and while it was still in the pursuer's hands. The pursuer called out a name, as if some comrade was at hand to help him, whereon defender grasped pursuer by the throat to prevent his further calling. The defender took from pursuer's pockets powder and shot flasks, and threw them away on the ground. The defender succeeded in wresting the gun from pursuer, and then he ran to the farmhouse, leaving the pursuer on the ground. Next morning marks of the struggle were observed by witnesses at the place, but the flasks were not found, or have since been discovered. The defender afterwards discovered that it was the pursuer with whom he was engaged. He sent the gun to the office of the county police, and sent the pursuer a letter that he would get it there, but who did not seek to obtain it. The pursuer's testimony did not differ from that of the defender, except to exaggerate his injury and suffering. That he had not been greatly injured is established by the fact that he did not seek medical aid until six days after the affray, and the surgeon had only the statement of his patient as to the extent of the injuries, as no marks were visible.

"On the defender's information the Procurator-Fiscal prosecuted the pursuer before the Sheriff under both the first and second sections of the Game Day Trespass Act. The only direct evidence was the defender. The Sheriff convicted the pursuer under the first section, and imposed the modified penalty of 20s., with 40s. of costs. The pursuer went to prison. The Sheriff was of opinion that the pursuer could not be convicted on both sections, as the charges were not cumulative, and the second section is only an aggravated form of trespass. It never could have been contemplated that a person was to

be subjected to 40s. for simple trespass, and £5 additional for refusing to leave the land, with expenses of prosecution indefinite in amount. The Sheriff might have perhaps convicted under the second section, but under the circumstances he deemed it much more just to place the conviction solely under the first section of the statute as one of simple trespass.

"The second item in the schedule is not attended with much difficulty. The pursuer was offered, and must take, his gun. He says it is not in the same state as it was when taken from him by defender, and is now broken. There is no proof of the state in which it was when in his possession, and it may have suffered somewhat in the struggle. There is no evidence that the flasks were taken possession of by the defender. The pursuer, who was left on the ground, may have appropriated them before leaving; but, of course, the circumstance of the removal of the gun and flasks is matter of consideration under the first article of the schedule.

"The Sheriff, at the hearing of the case, asked the defender's solicitor if he could cite any authority under common law or statute which entitled the defender to search the pursuer and take possession of his gun and flasks. He failed to show any such authority. It is not sufficient that the pursuer was a wrongdoer, and for which he has suffered punishment. This did not entitle the defender to take the law into his own hand and deprive the pursuer of his property. The pursuer was entitled to vindicate the rights of property and person, and any violence in order to obtain possession became an assault. The first section of the Game Trespass Act only renders the trespasser subject to a pecuniary penalty. The second section gives certain persons interested in the protection of the game to require the trespasser to quit the land, and to tell his name and place of abode, and failing his so doing to apprehend the offender and convey him to a justice of the peace within twelve hours of the apprehension. No authority is given to disarm the offender or deprive him of his property, or in any way to assault or injure him. The pursuer gave a name and place of abode, both of which he admits were false, but the defender was not at the time aware of the falsehood, so this could have formed no element of his seizing the pursuer's person and property. The defender went to the farmhouse and left the pursuer on the land, and it is proved that the pursuer was easily discovered in Perth and convicted of the trespass.

"In illustration of the want of power to disarm trespassers on the ground reference may be had to the Prevention of Poaching Act, 1862. By the second section of that Act it is made lawful for 'any constable or peace-officer (but no one else) to search any person on any highway, street, or public place (but not on private grounds), and to seize game and gun or other engines used for killing game.' So far back as 1752 it was found that 'power is not given by any statute for summarily seizing either the person of a common fowler or his guns and nets' (*Gregory v. Wemyss*, Morrison's Decisions, 4989). The wisdom of this rule of law was well exemplified in the trial of Mungo Campbell for shooting the Earl of Eglinton in 1769 when struggling for possession of a fowling-piece (*M'Laurin's Criminal Cases*, 505). A landed proprietor was sentenced to eight months' imprisonment for wounding poachers in the act of poaching (3rd December 1838, Kennedy and Swinton, 213). Lord Meadowbank observed, 'In no case has any party a right to use weapons of any kind or description, whether lethal or not, to protect his game from any amount of poaching.' In a case which went from this Court, where the trespassers had been merely apprehended and brought before a justice after he had given his name and designation, Lord Cunningham (19th December 1846) awarded damages. He remarked, 'The trespass committed in the first instance by the pursuer (though a civil wrong) was not a moral or criminal offence. Hence the defenders, who were not constables, had no right but what the statute gave them summarily to apprehend the pursuer. On the contrary, such power seems to have been carefully withheld by the Legislature, from the consideration probably that every occasion for collision between gamekeepers and poachers should be avoided, as they often lead to bloodshed.' The Lord Ordinary con-

cludes with the remark in which every judge must concur, 'The same law must be conceded to the poacher as was previously administered to the game-keepers if they are found in the wrong.'

"Of course it cannot be said that the pursuer comes into Court with clear hands, and there must be sympathy felt for the defender, a young landed gentleman, coming into possession of his estate and finding its amenity and privacy rudely disturbed by a poacher. The pursuer was first in the wrong, and suffered little injury in the unseemly conflict, so £5, including costs, appears amply sufficient to maintain the impartiality and integrity of law and justice in dealing with all classes of the community. HUGH BARCLAY."

Act.—John Stewart.—Alt.—H. Whyte.

SHERIFF COURT OF PERTH.

EDWARD WEBSTER v. WILLIAM SHIRESS.

Reponing of appointment of executor—Father's title to the appointment in preference to a brother of the deceased.—A father obtained himself decerned executor to a deceased daughter, but under a mistake in her Christian name. The father died, leaving a will. His executor obtained himself nominated executor to the deceased daughter. A brother applied to have the nomination recalled, and he appointed. It was objected that the decree could not be recalled, and though it was, the father was preferable to the office, and his executor in his stead. The following interlocutors were pronounced on the questions, both of which are new and important :—

"*Perth, 1st March 1878.*—Having 'heard parties' procurators, and made avizandum with the process and debate on the preliminary plea, repels the same, and orders the case to be enrolled for further procedure, and on the defender's motion grants leave to appeal to the Sheriff. HUGH BARCLAY.

"*Note.*—There is no question but that procedure in what was formerly commissary cases must so far as *practicable* be conducted in like manner as in ordinary Sheriff Court cases; but there must be the reasonable adaptation to circumstances. In cases of executry the process formerly commenced by edicts published at the market cross and parish church, and now through the Edictal Office in the Register House. When opposition was offered the opposing parties compared, not by way of stating defences, but by competing petitions. In the section founded on, and especially when viewed by the antecedent enactments bearing on the subject, it is clear that it has reference only to petitory actions where individuals had been cited under certification. The parties so called are bound to appear within a certain time, and to lodge defences. There are several departments in Sheriff Court practice which cannot possibly be comprehended within that section. Such are cessiones, multiplepointings, appeals in bankruptcy, poor law applications, service of heirs. Were the defender correct in his position, any one of kin, however remote, nay, one without any kindred, might with haste obtain himself or herself decerned executor to a person deceased. The person who only was entitled to the office, and who may be in distant or foreign parts, and may for a time not have heard of the death, would be precluded from contesting the office unless under the heavy penalty imposed by the Act, and without lodging defences against a suit which he was never called on to defend. H. B."

On an appeal the Sheriff (Lee) affirmed.

"*Note.*—An able argument was submitted on behalf of the defender to the effect that, under the 14th clause of the Sheriff Court Act, 1876, the only competent form of obtaining the recall of the decree dative, referred to in the petition, is by presenting to the Sheriff a written note as provided in subsection (2). But the Sheriff is of opinion that the provisions of that clause are not strictly applicable to a decerniture of the kind in question. They apply to

decrees in absente pronounced in actions where appearance may be entered and defences lodged; and although it seems to have been held competent in the case of *Macpherson* to repon a party against such a decerniture, the Sheriff is satisfied that the form most consistent with Commissary Court Practice, under the Act 21 & 22 Vict. c. 56, is to present a counter petition, and to accompany or conjoin with the same a petition for recall of the previous decerniture. This seems to be contemplated in the 44th clause of the Sheriff Court Act of 1876, and it is the form of which Mr. Alexander gives a style in his work on 'Commissary Court Practice,' p. 199. It was also urged that an inferior Court cannot recall its own decrees, and that on this ground also the present petition is incompetent. But in commissary matters the Sheriff Court is not properly an inferior Court, but a Court of privative jurisdiction. There may be cases in which it is necessary to proceed by reduction. The case of *Dowie v. Barclay*, 9 M. 726, affords an illustration of such a case. The allegation in that case was that the Commissary of Kinross-shire had decerned an executor to a defunct person not domiciled within his jurisdiction, and that the party so decerned executor was not entitled to the office. It was said that the defunct was domiciled in the county of Edinburgh. As the Commissary of Edinburgh could not recall the decree erroneously given by the Commissary of Kinross, reduction was necessary to enable the petitioner to proceed. But there is no difficulty of that kind in the present case.

"The Sheriff is therefore of opinion that the preliminary plea has been properly repelled. It may be for consideration whether a warrant should not be granted for retransmission of the former proceedings, in order that they may be conjoined with this application. The only question at present, however, is whether the defender's first plea can be sustained or should be repelled to the effect of enabling the petitioner to proceed with his application. R. L."

On the merits the following interlocutors were pronounced:—

"*Perth, 22nd May 1878.*—Having heard parties' procurators, and made avizandum with the process and debate, Finds: First, Sophia Webster died intestate in the county of Perth on 17th September 1876; second, James Carnegie Webster, father of the said Sophia Webster, obtained himself decerned on 27th April 1877 to one *Euphemia* Webster, intending it for the said Sophia Webster, but which decree was not extracted, and is not now insisted on; third, the said James Carnegie Webster died on 19th July 1877, leaving a will whereby the defender, William Shiress, was named his executor, and on the 31st August same year he obtained himself decerned executor of the said Sophia Webster, as representative of the said James Carnegie Webster; fourth, Edward Webster, the eldest surviving brother, and one of the next of kin of the said Sophia Webster, on 19th December 1877 presented a petition to this Court, praying to have recalled the decret given in favour of William Shiress, of date 31st August 1877, and to have the petitioner, Edward Webster, decerned executor dative, *qua* one of the next of kin to the said Sophia Webster: Finds in law that James Carnegie Webster, though as father under the statute of 1855 he is entitled to half of his daughter's movable succession, he was not entitled, nor is the defender, William Shiress, as his representative, now entitled to exclude the petitioner, Edward Webster, from the office of executor as one of the next of kin: Therefore recalls the decerniture of date 31st August 1877 in favour of William Shiress, and decerns Edward Webster executor dative, *qua* one of the next of kin to his sister Sophia Webster, reserving all claim and action for participation in the executry: Finds William Shiress liable in costs to the said Edward Webster: Remits the account thereof to the auditor to tax, and decerns.

HUGH BARCLAY.

"*Note.*—The solicitor for Mr. Shiress took no plea on the decerniture obtained by the father in April 1877, but took his stand solely on the statute 4 Geo. IV. c. 98 (1823). According to the general law of succession at

the time of the passing of that statute as it still is, descendants first succeed to intestate succession, next collaterals, and lastly ascendants, and finally the sovereign.

"There was at one time a distinction between heritage and movable succession. In the former there was representation, and in the latter, unless the next of kin confirmed to the succession, it did not vest. To remedy this, and to introduce representation in movable succession, the statute 1823 was passed.

"Before the statute 18 Vict. c. 22, 1855, a father had no interest in the moveable succession of his children, and so could not have competed with the brothers and sisters. He could not have obtained decerniture unless descendants and collaterals had all failed.

"The Act 1855 gives a father one half of the movable succession of a child dying intestate and without issue, but this is merely a claim of debt. There are no words implying he is entitled to the office of executor as next of kin in exclusion of collaterals.

"The solicitor for Mr. Shiress pled his case much on the *greater interest* of his client over the collaterals, but it is not interest that confers the office. Had there been only one brother or one sister, the interest would then have been equal, and it will not make a general rule subject to mere accidental circumstances. By the first clause of the statute 1855 the next in kin is declared to have exclusive right to the office in preference to the children or other descendants of any predeceasing next of kin, though it might be that this person so favoured might have a very small interest in comparison to the others entitled to share in the succession.

"The word 'kin' is not perhaps easy of being defined; it obviously has its root in 'kindred;' in general parlance it is confined to descendants and collaterals. A wife, however close the tie, takes office not as next of kin, but *qua relict*. Those on the same platform take office as '*nearest in kin*,' but if there be only one in the *stirps* as '*next of kin*.' But if the father is preferable to collaterals, he must take office either as one of the nearest or the next of kin, and he can only have the last denomination. If he is entitled to the office, then the mother, with less interest, is also entitled to the office as nearest or next of kin to a deceased son or daughter. It may be that the parents, failing collaterals as a creditor for their interest, may be entitled to the office, but just as a creditor is decerned *qua creditor*, the parents should be designated as *qua father* or *qua mother*, certainly not next or one of the nearest in kin.

"H. B."

On an appeal the Sheriff (Lee) affirmed.

"*Note.*—The Sheriff is of opinion that there is nothing in the statute of 1855 to entitle a father to claim the office of executor dative *qua* next of kin to his deceased child in preference to the brothers of the defunct; and therefore in no view of the statute Geo. IV. c. 98, sec. 1, can he hold the defender, Mr. Shiress, entitled to prevail in this competition. It was conceded that he could only succeed by showing that his alleged author was next of kin at the date of the defunct's death. In support of that view, the Sheriff heard a full argument, founded on the natural order of propinquity, referred to by Erskine (III. viii. 7). But it was admitted that in practice the statute of 1855 had not (so far as appeared) been acted on as affecting a change in the order of propinquity referred to in the 4th of Geo. IV., and in the opinion of the Sheriff the case of *Muir*, petitioner, as reported (4 Macp. p. 74), indicates the reverse, for there the mother was conjoined not as next of kin, but *qua mother*.

"R. L."

Act.—*Mitchell.*—*Alt.*—*M^r Stewart.*

A. V. B.

Sheriff BARCLAY.

In an action of paternity and aliment at the instance of a married woman against a married man. The defender admitted the paternity, but pled that from his small means and his burdens he could not afford to pay the usual aliment, but offered a much smaller sum. The following interlocutor was pronounced :—

“Having heard parties’ procurators, and made avizandum with the process and debate; in respect that it is admitted that the pursuer is a married woman, but that her husband is in foreign parts, appoints her agent, Mr. J. B. McCosh, her curator *ad litem*; in respect that the defender admits the paternity of the child libelled, and is therefore in law bound in mutual support of the child with the pursuer; and in respect that the rate of aliment claimed is the usual and lowest rate of aliment allowed in this Court for the support of illegitimate children, decerns in terms of the prayer of the petition: Finds the pursuer entitled to expenses, remits the account thereof to the auditor to tax, and decerns.

HUGH BARCLAY.

“*Note.*—This is a peculiarly disgusting case, but must be dealt with according to legal principles. The question is simply, What is necessary for the infant child? This has been ascertained and long fixed in this Court and county. This is a debt due to the child by both parents, with mutual relief the one against the other, the mother of course giving her share chiefly in the nurture of the child. The claim, as the defender himself states, is one of simple debt. If so, it cannot enter into the question whether the debtor can afford to pay his debt. In a question with the Parochial Board such is of course a consideration. The Poor Law is bound to give relief wherever such is necessary, but the relief given is not matter of debt. In the criminal prosecution by the Board against a parent bound in relief ability is expressly set forth in the statute. In a civil action the relatives bound in support cannot be asked to give more than they can afford, and cannot be made to pauperise themselves so as to help one already a pauper; but in a question between parents the claim is one simply of debt, and must be dealt with in the same manner as all other claims of debt. The *quantum* of aliment is regulated by *classes*, not by *persons*. In persons of rank and affluence the amount of aliment may be, and has been increased, not so much from the ability of the parents to afford a higher rate, but that the child may be better dealt with, and educated according to its parentage. But there has never been a case in this Court where the rate of aliment is lowered so as to suit the abilities of the putative father. Indeed, if that rule was to be adopted, the ability of the mother would require to be looked at as well as that of the father. In short, if the defence set up was to be adopted, there could be no *general* scale of aliment, but one varying in each case according to the ability of the parents at the time. A party may one year be in very poor circumstances, whilst subsequently, by inheritance or other good fortune, he might be in an affluent state. Indeed, according to the rule that debt is coupled with ability, to meet it there must be an arbitrary decree, variable not only in each case, but in the same case with each successive period of time. According to the defender’s plea, if a defender in this class of cases has nothing to pay, then there ought to be no decree. The father might by paralysis or some other casualty be wholly unable to contribute one farthing, and himself be an object of charity, and it would follow that in such case the debt must be extinguished and no decree given. Apart from the *legal* obligation on a debtor to pay the *full* amount of his debt, it must appear that to admit the principle contended for by the defender, that in this class of cases the obligation depends on the debtor’s *ability*, would be greatly to encourage vice, shelter the guilty, and augment the burdens already heavy on the ratepayers.

H. B.”

On an appeal, Sheriff Lee (22nd Feb.) affirmed the above interlocutor without any note.

THE JOURNAL OF JURISPRUDENCE.

THE NEW LAW OF REGULAR MARRIAGE.

"THE MARRIAGE NOTICE (SCOTLAND) ACT, 1878."

FROM the 1st of January next the law of regular marriage in Scotland will be chiefly found in an Act which has just passed through the Legislature. It is to be cited for all purposes as the Marriage Notice (Scotland) Act, 1878, but it is intitled "An Act to encourage Regular Marriages in Scotland." Dr. Cameron, one of the members for Glasgow, has been the promoter of two bills on this subject. His first, which was dropped after discussion on the second reading, was to be quoted as "The Banns of Marriage (Scotland) Act, 1876," and it proposed to "abolish the system of proclaiming banns of marriage presently in force in Scotland, and to make provision for the due publication of such banns in Scotland." Really, what it proposed to do was to supersede the ecclesiastical proclamation of banns by a system of notice to a registrar, though this last might be described as a new and secular form of banns. The present Bill, on the contrary, retains the form of notice in the Parish Church for those who choose to use it, but it provides a secular alternative so cheap as probably to supersede the other; and above all, it for the first time separates regular marriage according to the law of Scotland (still in every case to be marriage by religious ceremony) from all necessary connection, even by way of preliminary, with any particular Church. The present Bill was the subject of careful consideration by a well-mixed committee of the Faculty of Advocates, which reported unanimously in its favour, making, however, certain suggestions in regard to it. It was reviewed with care in both Houses of Parliament, receiving some final touches, it is understood, at the hands first of the Lord Advocate, and afterwards of Lord Chancellor Cairns. But it is owing to the conciliatory skill and steadfastness of Dr. Cameron that it has at last emerged in the form of an enactment which will henceforth define and regulate regular marriage in Scotland, at least until the law of marriage throughout the United Kingdom, including the whole relation of the consensual contract to public law, is made the subject of legislation.

The rules as to Marriage Notice are easily summarized.

The leading provision is that "from and after the commencement of this Act it shall be lawful for ministers, clergymen, or priests in Scotland to celebrate marriages therein after such publication of notice of an intention to marry as is hereinafter prescribed, and upon production to such minister, clergyman, or priest of a certificate or certificates of such publication as hereinafter prescribed, and any marriage so celebrated shall be deemed to be a regular marriage as if it had been celebrated by such minister, clergyman, or priest after the proclamation of banns of marriage according to the mode now in use." The next section provides for the Society of Quakers and persons professing the Jewish religion, and their marriages also are declared and confirmed as "regular" upon similar notice to the Registrar. That functionary is not created by this Act. It accepts him as already brought into existence by the 17 & 18 Vict. c. 80, but it provides that in order to regular marriage without banns by persons in Scotland, "each of such persons shall, on or about the same date, give notice of the intended marriage to the Registrar of the parish or district in which he or she shall have resided for a period of not less than fifteen clear days previous to the giving of such notice, in the form as nearly as may be set forth in the Schedule A annexed to this Act; provided that when both of such persons reside within the same parish or district it shall suffice for one of them to give such notice." The alternative "*parish or district*" will be of great practical importance in large towns, where the ascertainment of the old parishes is often a wearisome and uncertain process. On receipt of the notice, and of one and sixpence as fee, the Registrar inserts the particulars in his "Marriage Notice Book," and posts up "on the door or outer wall" of his office a notice in the form provided by a schedule. It is to be kept posted up for seven days, and the "Notice Book" is to be "at all reasonable times" open to inspection for a shilling. At the expiry of the seven days, if no objection as after mentioned is lodged, the Registrar is to grant a "certificate of due publication" on payment of a shilling—the whole expense in each "*parish or district*" being thus only half-a-crown. The certificate becomes void in three months from its date if the marriage has not taken place within that time. The other provisions as to procedure relate to possible "objections" which may be stated to the Registrar. He is to disregard all such "not appearing on the face of the notice," unless they are stated before he gives his certificate, and are put in writing and signed (then or later apparently) by the objector, and lodged with the Registrar by a formal declaration in terms of a schedule appended to the Act. But when an objection is thus lodged, it is to be dealt with differently according to its character. If it is (for example) that a name is wrong, or that the fifteen days' residence has not been complied with, and generally where the objection does not set forth a legal

impediment to a marriage between such persons, but relates to some formality or statutory requirement merely, the Registrar shall suspend the issuing of his certificate, and shall consider the objection, and make such inquiry thereon as he shall see fit, and report thereon as soon as may be to the Sheriff or Sheriff-Substitute of the county in which his office is situated, who shall, on such report, direct the notice to be amended and a certificate to be granted thereon without republication thereof, if he shall see fit; or to be cancelled, if he shall see fit, in which case it shall be competent for the persons intending to contract marriage to give notice *de novo* of their intended marriage." But the objection may be more serious, *e.g.* that one of the parties is married already; and in such a case, "and generally where the objection sets forth any legal impediment to a marriage between them, the Registrar shall suspend the issuing of his certificate until there shall be produced to him a certified copy of a judgment of a competent court of law to the effect that the parties are not in respect of the said objection disqualified from contracting such marriage." It does not appear to us that under this clause an alleged promise of marriage to another woman is the sort of alleged legal impediment to which a Registrar could give any effect; but it may be rash to construe a new provision hastily. A Registrar who wilfully grants a certificate without complying with these requirements is liable to a fine of not more than £25, or a month's imprisonment, and to be deprived of his office. And a penalty not exceeding £50 is provided for "any person otherwise entitled to celebrate a marriage who shall celebrate a marriage in Scotland with a religious ceremony" without having *either* a Banns' certificate or a Registrar's certificate—the Sheriff being the judge, and the Procurator-Fiscal the exclusive prosecutor.¹

Dr. Cameron's Act will work a quiet practical, and perhaps also a theoretical, revolution in the region with which it deals. The average of fees in each parish to Session-Clerks under the hitherto-existing system has been, we understand, 10s. 10d. The whole charge payable to a Registrar under the present Act is 2s. 6d. It is plain that the former system will be swept away, or cut down to the model of that of the statute, which accordingly concludes with

¹ It was, we believe, in the House of Lords that a clause was added to the first schedule appended to the Bill—that of the notice to the Registrar. This addition to the schedule notice says that it is "subscribed and declared by the above named in the presence of us, the undersigned householders in the above-mentioned parish (or district), who declare that we believe the statements contained in this notice to be true." And they are then to sign. The provision that any party who is to give notice of marriage is to take two householders with him is a very important one—so important that it ought unquestionably to have been expressed in the enactment itself. Indeed, the omission to do so may raise a serious question. The mere direction that the party shall give notice "in the form as nearly as may be set forth in the Schedule A"—the Schedule A including the clause above quoted—is an inappropriate if not an incompetent way of effecting any statutory restriction which is not a mere matter of form or expression, as this certainly is not.

that "any marriage so celebrated shall be deemed to be a *regular marriage*." And a subsequent section varies this provision by providing that a Registrar's certificate shall be of equal authority with a certificate of banns "in authorizing a minister, clergyman, or priest in Scotland to celebrate a *regular marriage*."

In every point of view, therefore, the new enactment deliberately, and with full intention, emancipates regular marriage from ecclesiastical restrictions, while it sets it up on the foundation, if not of national religion, at least of the general divine ordinance which our institutional writers claim for all marriage. The machinery of registration which it uses, points out, too, the direction in which any general law, codifying and assimilating the marriage law of the United Kingdom, must proceed. On the whole, therefore, while our law on this subject is still in a state of transition, we must consider the present enactment as an important step—useful in itself, suggestive for the future, and irreversible.

A. T. I.

TWO RECENT RAILWAY CASES.

Two cases, dealing most intimately with the relations of our railway companies to the travelling public, have recently been decided, the one in the Second Division of the Court of Session, and the other in the Court of Common Pleas, which raise points of the greatest interest and importance, not only to the legal profession but to the nation at large. They have each in their own local sphere already received a certain amount of notice from the press, but we think it will not be a misuse of the columns of this journal if we advert to them now at some length, not so much for the purpose of criticism as for that of enabling our readers to do that for themselves after a perusal of the facts, and of a few superficial suggestions which readily occur when narrating these.

The two illustrate one another at the same time that the opinions of the Judges appear to conflict. One of them, the English case, has been appealed to the High Court of Justice by the Railway Company, who lost it in the Court below. The Scottish case is not to be pushed further. But we trust that, as a decision by the Supreme Court of Scotland on a matter affecting the everyday life of all who travel, it will not be lost sight of by those concerned in the ultimate stages of the English case.

We propose to deal with the latter in the first place, principally because it raises a more distinct issue than the Scottish case, and therefore forms a better text, and also because it cannot be so familiar to those in this part of the island as the other necessarily is.

The second case is that of the *London and Brighton Railway Company v. Watson*. Mr. Watson was a second-class passenger

from Norwood Junction to Lower Norwood by a train which had originally started from New Croydon. He had had no time to get a ticket before the train left Norwood Junction, and on arriving at his destination he tendered sevenpence to the collector, which was admittedly the fare which was the charge for a ticket from Norwood Junction. The collector declined to accept the sevenpence, and demanded payment of eightpence, which was the fare from Croydon Junction, the original point of departure of the train. Mr. Watson refused payment, and an action was thereafter brought by the Railway Company in the Southwark County Court for the additional penny. There was no imputation of fraud against Mr. Watson, and the claim of the Railway Company was entirely vested upon their statutory rights. They founded on the following bye-law:—

“Any person travelling without a ticket, or failing or refusing to show or deliver up his ticket as aforesaid, shall be required to pay the fare from the station whence the train originally started to the end of his journey.”

This bye-law had been framed in virtue of the power given to railway companies by the 109th section of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), to make bye-laws so long as they are not repugnant to the Act itself.

The contention which the Railway Company, the appellants from the judgment of the County Court judge, had to meet was that the bye-law in question was unreasonable and repugnant to the 103rd section of the Act 8 & 9 Vict. c. 20, which provides that a passenger travelling without a ticket with intent to avoid payment shall forfeit to the Railway Company a sum not less than forty shillings.

In the Court of Common Pleas, to which the appeal was taken, the cause was heard before Lord Chief-Justice Coleridge and Mr. Justice Lopes; and after these learned judges had taken time to consider their judgment, a lengthy and elaborate opinion affirming the decision in the Court below was delivered on the 29th June last by the Lord Chief-Justice, in which Mr. Justice Lopes concurred. The following extract shows the grounds of judgment:—

“I think the bye-law void on two grounds: (1) I think in substance it is an attempt to inflict a penalty for doing that without fraud which, by the joint operation of the 103rd and 109th sections of the Act 8 & 9 Vict. c. 20, can be punished only if it is done with fraud. The principle of the decision in *Dearden v. Townsend* (1 L. R. Q. B. 20) appears to me to cover this case. It is true that in that case the bye-law which was the subject of decision went beyond the bye-law in this, because it professed to punish the non-payment of the excessive fare by a penalty not exceeding forty shillings, and the proceeding was a proceeding before justices to impose the penalty. The actual decision of the Court was that the Company could not by a bye-law make that an offence irrespective of fraud which the Act of Parliament had expressly only made an offence with it; and that so to legislate would be repugnant to the Act which gave power to the Company to legislate only in accordance with and subject to the Act itself. But the judgments seem to me to show that all the judges of the Queen's Bench were not speaking

with reference to the form of the procedure before them only, and that they would have thought this bye-law equally inconsistent with and repugnant to the spirit of the Act of Parliament, inasmuch as under it a perfectly honest person might be visited with highly penal consequences for an act sometimes, as railways are conducted, reasonable or even necessary; at all events, an act perfectly innocent, or at most no more than careless. Moreover, if I rightly understand the reasoning of the Lord Chief-Justice in that case, he thought the bye-law, even apart from the penalty, could only be held good if it was directed to the wilful withholding of a ticket, and in this view my brothers Mellor and Lush appear to have concurred. I think, therefore, this case is within the decision of the case of *Dearden v. Townsend*, with which case I entirely agree. . . . But there is another ground before I proceed to the question of reasonableness on which, as I think, this bye-law must be held to be void and illegal. We are not informed in this case . . . what is the largest possible fare which this bye-law would authorize to be exacted. But it is manifest that it might exact from a passenger a sum larger than the largest first-class fare which the Act of Parliament authorizes the Company to charge for the whole distance *bona fide* traversed by the passenger from whom they seek to exact the excess. If, for instance, the passenger has travelled six miles, and the largest fare authorized by the Act of Parliament is 3d. a mile, or 1s. 6d., and the whole fare exacted from him is 10s., or 15s., or 20s., it is to my mind plain that the bye-law is repugnant to the Act of Parliament, and bad within the 109th section already referred to. . . . (2) But the bye-law appears to me to be bad equally upon the ground that it is unreasonable. It is manifestly unequal in its operation. A man who has travelled five miles or fifty may be mulcted in the same sum without any reference either to the benefit he has derived from the Company or the injury he has inflicted on it. It is unjust, because it makes no distinction between a man who has really perpetrated, or attempted to perpetrate, a fraud upon the Company and one who has by mere inadvertence lost his ticket after having paid his full fare, or from whom it has been stolen, or who has carelessly but innocently neglected to provide himself with one. The penalty, so to call it, which may in some cases and to some persons be a very serious one, is inflicted without any regard to evidence or merits. Once paid, there is, so far as I see, no obligation on the Company under the bye-law to pay it back even on the clearest proof that the ticket had been only temporarily mislaid, or had been bought and paid for and *bona fide* lost in any one of the numberless ways in which such an accident may happen even to the most careful railway traveller. Moreover, it imposes the fare altogether irrespective of any correlative duty on the Company. No information is afforded us by the case, and I possess none if I could use it, as to the facilities afforded by this Company for the purchase of tickets. But judges cannot strip themselves of their ordinary knowledge. It is at least possible (numerous examples show that it is highly probable) that tickets are sold by it with an almost contemptuous disregard of the commonest convenience of the public. A single small hole, open often only just as the train is starting, round which hole a struggling and eager crowd congregate, so numerous and so hurried that decent comfort and inquiry are out of the question, is the common facility, if so it must be called, to which railway companies, possessed by Parliament of a carrying monopoly, subject the long-suffering people of this country. No reason of common sense has ever been suggested, except that it might give the companies or their servants a little more trouble, why railway tickets should not be sold all day long at the stations like other tickets with which all of us are familiar. Yet a company which exposes an old man or a weak man, or a woman, to the alternative of a sharp physical struggle to get a ticket, or the possible loss of train, takes upon itself to mulct the same passenger in perhaps a highly penal sum because he travels without that ticket which they have themselves denied him the common and decent facilities to procure. Whether this is so or not with the appellant company I do not know. There is certainly nothing to prevent such a working of their traffic, and it is unhappily

too common in point of fact, and I think for these reasons this bye-law is unreasonable and bad. . . . It has indeed been suggested that as the 108th section of the Act 8 & 9 Vict. c. 20, gives the Company power to make regulations for *inter alia* generally regulating the 'travelling upon or using and working of the railway,' this bye-law is within these words, and that therefore the Company had authority to make it. But, first, the power given in the 108th section is limited by the words of the 109th, and bye-laws made to enforce such regulations must not be repugnant to the general law nor to the Act itself. For the reasons already given, I think this law is repugnant to the Act; and next, I should be prepared, if necessary, to hold that the words of the 108th section do not apply to such regulation as this, and that the words 'regulating the travelling upon or using and working the railway' do not extend to such a bye-law as this, but, fairly construed, must be limited to the ordering of the traffic itself, and the physical use and working of the lines and stations of the Company."

The Scottish case *Menzies v. The Highland Railway Co.* (June 8, 1878, 15 Scot. Law Rep. 608), the facts of which we shall shortly recall to the minds of our readers, was decided about a fortnight earlier than that on which we have been dwelling. Sir Robert Menzies, a well-known Perthshire Baronet, went to the Aberfeldy station of the Highland Railway Company on the afternoon of Friday, 4th May 1877, where he asked for a return ticket to Edinburgh. He was informed he could not get one, but that the day being Friday he could be supplied with a return ticket from Aberfeldy to Perth, by which he would save 3s. 7d. He purchased a ticket of that description, and travelled with it to Perth, but on taking his seat at that station to return by a train so far as Ballinluig Junction on the following Sunday morning he was informed that the ticket was not available for that day.

Sir Robert was then required to purchase another ticket, which he declined to do, and after offering his name and address to the ticket collector he was eventually ejected from the carriage by that official with the assistance of the porters. He thereafter brought an action in the Sheriff Court of Perthshire against the Railway Company for £50 damages and solatium, and £1, 12s. 3d. of expenses in driving from Perth to Ballinluig.

It is unfortunate, apart altogether from the result of the case, that the issue was raised in the form of an action of damages rather than in an action of declarator. For although some of the Judges in the Supreme Court, in deciding the case in favour of the Railway Company, the appellants from the inferior Court, expressed opinions, and decided opinions, upon the matters of law to which the action gave rise, the decision of these was hardly necessary to its result, and the Lord Justice-Clerk clearly declined to be committed to any determination upon them. His Lordship preferred to regard the case as a jury would, and found it only necessary to answer the question, whether the pursuer had made out a good claim of damage. And he further does not appear to have particularly adverted to the minor conclusion in the summons for repetition of the sum paid for the hire of a conveyance to

Ballinluig. Still the findings in the interlocutor entitle us to regard the legal doctrines laid down by Lords Ormidale and Gifford as binding upon the Court in the conclusion at which it arrived.

The Court held that though there was nothing upon the ticket to show that it was not available on Sunday, still that it was issued upon that condition, which was further sufficiently notified to Sir Robert by a reference to the time-tables ; and further, that the Company were entitled " summarily to interfere " to remove him as a hindrance to them in the use of the railway under the 102nd section of the statute.

At the outset it strikes us that the majority of the Scottish Court were willing to concede a much larger power to railway companies in the making of bye-laws under the Railways Consolidation Act of 1845 than seems to meet with the approval of the Court of Common Pleas. To take one instance. According to Lord Chief-Justice Coleridge's view, the 108th section of the Railways Clauses Consolidation Act, 1845, corresponding with the 101st section of the Scottish Act of the same year, which authorizes railway companies to make regulations for, *inter alia*, regulating the " travelling upon or using and working of the railway," is thereby limited to the ordering of the traffic itself, and the physical use and working of the lines and stations of the Company. So far from narrowing the construction thus far, which indeed it was unnecessary should have been done by the Court of Common Pleas for the purpose of the decision they were at the time pronouncing, Lords Ormidale and Gifford, besides taking it for granted that the bye-laws relating to the passenger-ticket department of the railway were clearly competent in view of the statutory power referred to, must further have been satisfied that they were not repugnant to the Act itself. But does the Act (both Acts are similar so far as our present purpose goes) itself authorize the penal interference of the Company, unless where they are made the victims of fraud ? It humbly appears to us that the powerful reasoning of the Lord Chief-Justice is equally applicable to the present case. The 96th and 97th sections of the Scottish Act are only of avail where the passenger has it in his mind to cheat the ticket collector. And in assuming the validity of the bye-laws referred to, it rather occurs, on applying one's-self to a consideration of the English case, that the condition is ignored in the bye-laws, and that they are framed irrespective of it. Nor will it suffice to say they have been sanctioned by the Board of Trade. That is no safeguard.

Lord Moncreiff's exposition of this part of the case was in harmony with the law laid down by the Court of Common Pleas. He remarks in one part of his judgment :—

" It is certain in point of law that by taking his seat in the train the pursuer committed no offence under the 96th section of the Railways Clauses Act, and that if the railway servants had given him in charge they would have ex-

ceeded their right. He was not a trespasser in that sense, and without saying that forcible removal from a carriage is equivalent to apprehension and charge, I think such violent proceedings should be reserved for cases in which there is an intent to defraud, or an intentional breach of the Company's bye-laws, or where some interest is endangered. . . . I should be sorry to encourage the idea that it is not only the right but the duty of the servants of a railway company to resort to such proceedings in every case in which the correct voucher is absent, although they may know that this has occurred in the best of faith, from unavoidable accident, excusable error, or want of distinct intimation on their own part, and that no substantial interest is in hazard."

The reasoning of Lord Ormidale and Lord Gifford on this point does not seem to bear any room for escape to the innocent traveller who has lost his ticket by inadvertence or accident. According to their theory he would also be "a hindrance" liable to be removed, however good a *prima facie* case he might be able to state. Sir Robert was able to display a ticket which constituted a contract apparently binding on the Railway Company, and giving him a good title until that was disproved. If Railway Companies desire to be fortified by the Legislature against negligence or excusable error, and to be armed with penalties against such venial trifles as well as deliberate dishonesty, let them get their powers directly from Parliament, and have them sanctioned and approved in regular form. Their contention in the two cases mentioned above seems faulty because they claim to have larger authority than Parliament has allowed them the power to assume, and to have assumed the right to wield that authority under cover of the sanction of the Board of Trade. We shall only add upon this point, that the previous cases of *Dearden v. Townsend*, 1865, 1 L. R. Q. B. 10, in England, and the Scottish case of the *Scottish North-Eastern Railway Company v. Mathews*, do not appear to militate against, on the contrary, they clearly support the view taken by Lord Coleridge and Lord Moncreiff. The latter case, which is reported, 5 Irv. Just. Reps. 237, was a Small Debt Court decision, where the Sheriff-Substitute had held that on a passenger arriving after the shutting of the ticket office and taking his seat in a train without a ticket, the Railway Company were not entitled to eject him, but that he could claim repetition of his charges for conveyance by road to his destination. That decision was appealed to the Circuit Court, and the appeal sustained on the ground, as the report seems to us to bear, of informality in the account appended to the summons. Lord Ormidale certainly seems to have attached greater weight to this reversal, and to have founded on it as an authority for the proposition that a railway company might eject a passenger who had no ticket, whether there was wrongous intention or not. But there is surely no warrant for this in the reported opinion of Lords Ardmillan and Neaves, which specially bears that they declined, as they inevitably must have, to investigate the merits of the question.

ON CERTAIN PRINCIPLES AFFECTING THE LIABILITIES OF MASTERS AND SERVANTS.

NO. VII.

It is unnecessary to do more than to give a general idea of Mr. Brown's argument without detailing the matters contained in the paper, or making any extensive quotations from it. The writer pointed out the necessity for some provision in the case of accidents for those workmen who are engaged in dangerous occupations, and also the necessity for supplying this without a violation of the true principles of justice or of policy. A system of insurance was the method recommended, insurance not voluntary, for that would not protect the improvident, who most require it, but compulsory by law for certain occupations. Vaccination and the charity enforced by the Poor Laws were given as instances already known to our law where compulsory powers of a similar character were exercised with salutary effect; whilst the statutes as to the hours for labour and the ages of those employed, the Truck Acts and others, were quoted in proof that freedom of contract has already been trenched upon by the Legislature, and that further steps in this direction are therefore merely questions of expediency. To the objection that compulsory insurance would injure Friendly Societies now existing, the writer replied that, on the contrary, it would considerably add alike to their membership and their funds. All employers, by the scheme of Mr. Brown, were to be prohibited from employing men not insured to a certain amount either in a Friendly Society or Insurance Company; and the employer was to be exempt from liability, but must contribute a certain portion of the expense of insurance. As to the resulting changes—1. In case a servant or his family became chargeable to the rates from the consequences of an accident, the proposal was that a fixed proportionate sum should be paid by the employer as a penalty to the poor-rates (not to the workman); and further, of course, if a servant were taken into employment uninsured, it was pointed out that neither party would be bound by any contract, but might terminate the service at any moment.

2. Only a *limited sum* would be assured. This was regarded by the author as an essential feature of his scheme, in order to enable the master, on the one hand, to provide for his premium and to know his liability; and, on the other hand, to secure the workman against having heavier premiums to pay from his wages than he could afford to devote to such a purpose. Colourable evasions of the law would thus also be guarded against, and a check put upon litigation, the limit being fixed by a reference to the practice of existing societies and companies.

3. The only practically valuable insurance was one against

every kind of accident however caused; and the proportion of accidents caused by fault of the sufferer himself to that of accidents where the injured were not to blame was stated at five to one, or nearly so, judging by comparison from the case of railway servants. This would lead to a result very much diminishing the proportion of premium paid by the employer, who could not, it was observed, be asked to pay for insuring a man against his own fault.

Instances were given of Railway Companies (the Midland and the London and South-Western) where compulsory insurance had been for a good many years in operation by the voluntary act of those interested. Again, the Northumberland and Durham Miners' Permanent Relief Fund, with 25,000 members as far back as 1872, and now with nearly 70,000, was inquired into financially, and as a result it was found that a payment of 2d. a week will secure, on a perfectly sound basis, a pension (valued at £160) to the widow and children of a member, and allowances of 8s. and 6s. a week respectively for permanent and temporary disablement. In this case, however, the colliery owners have been large contributors. "A full half," Mr. Brown said, "of the usual societies' rates of insurance are due to death or disability by sickness; and of the other half of the rate charged, which is for accidents, I have already shown that not more than a fifth part are, probably, to be ascribed to the faults of other men than the sufferer himself. It seems, therefore, that less than a tenth part of the cases relieved out of the general funds of a Railway Friendly Society would be accidents caused by other servants' faults, and consequently that a subscription by a railway company of 10 per cent. on the men's own subscriptions would fairly cover the limited class of accidents we are dealing with—that is to say, those which are not caused by the man himself. Thus a man receiving 20s. a week, and paying 6d. a week for insurance, would only pay $2\frac{1}{2}$ per cent. on his wages, and a tenth part of that is only 0.25 per cent. of the wages, or about a halfpenny in the pound, which cannot be called a heavy tax to provide against accidents. Some may think that employers might fairly be asked to contribute rather more than this, at least in cases where the wages are below 20s. a week, for this is the class exposed to the most frequent accidents, and who would feel the deduction of 6d. a week the most. However, on this question of how much the masters should contribute, the safest plan seems to be to follow the example of the best of the Friendly and Provident Societies which have been referred to.

"Would there be any injustice to the masters, in hazardous trades, in compelling them by law to contribute to the fund to this limited extent? I apprehend none; it being only a small security to the public against throwing disabled men on them for support. It would be fairly balanced by an enactment exempting the masters from all further liability for accidents to their own servants; and by the consideration that juries would, and do, give three or four

times as much as a Friendly Society allows, whenever the master is fixed with a legal liability.

"It must also be remembered that the master could generally throw the charge on the public by a very trifling addition to the price of his commodities. It would be very small in any case; for a halfpenny in the pound on the wages would generally be less than a farthing in the pound on the price of the coals, or the lead, or the carriage, as the case may be."

It was further pointed out that the same considerations would, with equal force, apply to every hazardous occupation, only subject of course to the varying risk and consequently varying premium. In conclusion, two suggestions were made, one to the effect that all who had already insured might be exempt; the other, that any one receiving above a certain weekly payment should not be compelled to insure, as such a person was able to take care of himself.

These, then, being the leading features and suggestions of the communication upon which the discussion was based, we may turn to the address by Lord Shand, for a clear statement of what is actually now going on in Germany under a very analogous system of insurance. The report of what took place informs us that his Lordship observed that in Germany a system of insurance, by means of Friendly Societies—to which both workmen and masters are bound to contribute—had been in operation, as regards mining works, for many years. By a law passed, now thirteen years ago, on 24th June 1865, applicable to all mines and works for dressing and smelting minerals, it is provided that each mining district must have its *Knappschafts-Verein*, or Friendly Society—the constitution of which must be approved of by the public local authorities, and that masters and workmen must all join the union or society. The constitution prescribes that each workman shall pay either a certain small percentage on his wages or a certain proportionate fixed sum, and the payment in the former way is made periodically by the master, who retains the amount in paying the wages to his workmen. Employers again are themselves bound to pay to the society a sum which must amount to at least one-half of the payments of the workmen. These unions provide not merely for the consequences of accidents, but for sickness and death occurring while the workman is engaged in his employment, and the workman is entitled to medical attendance and medicine, and to a certain regular allowance for support for his lifetime, if necessary; or for a time if he be only temporarily disabled; while in the event of his death a contribution is given towards his funeral expenses, and support is given to his widow for life or till a second marriage, and also to his children till they reach the age of fourteen.

When the law of June 1865 was introduced in Germany there were many Friendly Societies in existence, and all of these, at least 11 of them that were connected with mining, fell under the opera-

tion of the new law to the effect that their constitution required to receive the approval of the authorities, so as to secure, among other important points, that the amount or rate of contributions was sufficient to supply funds for the important purposes of each society. Lord Shand said he had the authority of a gentleman extensively engaged in mining enterprise in Germany for asserting that this law has worked admirably there in relieving the constantly-recurring distress which arises from accidents; and that a system of compulsory insurance in this way was only adopted because it had been found that, if left to the option of masters and workmen, insurance, as the best means of meeting the distress resulting from accidents, was adopted in far too limited a number of cases. Notice was also particularly called to the fact that in any cases in which the employer himself was liable for the consequences of accident, the law in Germany provided that the Court itself should decide all questions of liability, and in the matter of damages power was conferred upon the tribunals to determine whether the payment should be by a capital sum or by termly payments, the general rule being that of termly payments; further, if the master had contributed a substantial proportion of the damages by way of insurance, he was entitled to credit for this.

The advantage of such a regulation is evident, not merely in the prevention of litigation, but in its rapid mode of procedure when questions arise under it, as the jury system for cases such as these, arising out of accidents, only results in lingering suspense and anxiety to those to whom some present assistance is really almost all that is needed. But Lord Shand had extended his inquiries into this branch of law very far, and was able also to give an example of insurance on a very large scale where the master and the men were joint insurers for the safety of the latter.

Thus, we learn that an insurance was lately effected with an important insurance company in Zurich, through its Cologne agency, for the year 1878, extending over a body of workmen, upwards of 500 in number, engaged in a large lead mine and smelting works. The gross sum insured was £75,000; but such a calamity as would lead to a payment of this amount could not possibly occur, or at least was highly improbable, for it would involve the lives of almost all the workmen, and insurance companies abroad, as in this country, can provide against such extraordinary risks by a system of re-insurance. The annual premium paid to the Insurance Company was £350, and was calculated at the rate of one and two-fifths per cent., the total wages paid to the workmen employed for the year being £25,000. The Insurance Company decline under such a general policy to insure particular workmen selected, and for obvious reasons require that the whole workmen shall be insured so that the percentage, according to which the premium is estimated, shall cover and include the wages of all, and not merely of those most exposed to the risk of accident. In the particular instance referred to, each

workman earning in wages £50 a year, pays, through his employers, and by deduction from his wages, about 7d. a month only, or 7s. a year. But this payment and the contribution by his employers entitle him or his representatives, in case of accident resulting in death within a year, to a sum equal to three times his year's wages, or £150; and if permanently disabled so as to be for all time unfit to work, then to a payment, throughout his life, of about £20 a year, or 12½ per cent. on the amount of three years' wages, or, to put it again in another way, about 40 per cent. on the actual wage he is receiving. In accidents less serious the Insurance Company pay 1s. a day during the time when the workman is disabled. It is a fact of importance, specially noticed by Lord Shand, that employers in Germany who adopt this system of having a special insurance against accidents, of which all their workmen have the benefit, find it easier to get workmen than those who have no such insurance. Workmen naturally prefer employment in which they have this provision against the consequences of accidents, and, in practice, willingly contribute the small amount which, with the payment by the employers, suffices to pay the necessary premium.

Although this system works so well in Germany, and appears to give satisfaction to the employed, and a sense of security to capital embarked in mining and other dangerous pursuits, yet it must not be forgotten that the scale upon which all these pursuits are carried on is, comparatively to our own at least, but a very moderate one. Then, again, it was pointed out, in answer to the example of Germany as cited by Lord Shand, that the Germans were a drilled nation, drilled both politically and militarily, a statement happily not true of the English. The deadening effect of all this was shown not many years ago by the passive way in which the Prussian branch of the German people allowed their constitution to be violated and parliamentary power to be set at naught by a levying of taxes on the authority of the Crown alone. "On that occasion," the speaker said, "no John Hampden was found to step forward in defence of law and freedom, and ready to brave the anger of a hostile court; and it was not until the co-operation of the Liberal party was needed for the attainment of another object—German unity—that any attention was paid to their behests." But setting all these considerations aside, and supposing such societies to be formed, and the insurance premiums to be paid, as suggested, by both masters and men, there would still be serious difficulties to encounter, and these were pointed out with much force by many of the subsequent speakers. Thus, for example, what provision could be made to ensure that a sudden accident, involving a vast loss of life, would not ruin the insurance company, and that the widows and orphans would thus find themselves not only without any adequate means of subsistence, but poorer as well by the whole amount of the premiums paid to insure what they had failed to get. The remedy to meet this diffi-

culty was to ascertain the solvency of the company, it was said, by official audit of their books and so forth, but defaulters may be found daily among those who have charge of large funds, and who would find the money to make up for any long-undiscovered defalcations when they might come to light. Clearly the position of the Government would be that of guarantors, a position in those circumstances entirely a false one. If they undertake any charge in connection with this system of insurance it were better that they undertake every charge. Another question raised had reference to the manner in which the insurance would be adjusted to meet cases of men leaving one employment for another, and although this might be met by the "overhead" insurance already referred to, the question is not so simple as it might appear, for involved in it is found what we cannot but regard as the fatal objection to the whole scheme. That objection lies in the fact that no provision is made for any contributor who, for example, after many years of payment to the society or company gives up the dangerous branch of labour in which he had been engaged, and either enters on new pursuits or altogether retires from work. What has this man to get for all the money he has paid? Nothing. We hardly think any one would venture to say so. Even the ordinary life insurance company allows a surrender value for its policy, miserable though that allowance may be in proportion to what has been paid for it, and it cannot for a moment be supposed that a compulsory payment made by workmen would be otherwise treated. But can any insurance company be expected to add this feature to their working-men policies without further increase of premiums, ay, and further increase of a large amount?

All sorts of difficulties in connection with this objection keep rising before us. The men at present have their societies which pay them or their representatives not only when injuries or death are the result of accident, but during illness, or when they die from natural causes. The new proposal could not do that, for two reasons: first of all, the premiums would be largely increased, and upon the premiums a most jealous eye would be turned; secondly, because it is clear that no workman could have any right to claim a contributory payment by his master to meet a fund on which death from natural causes would give a widow and children claims, at least so far as that fund was available for such purposes. The reply will be made that the master would only contribute to the accident rate, but this would at once introduce distinctions in payments by the master and the men dangerous in their tendency, and not intelligible probably to the mass of those interested. Besides, what right has any legislation to force payments from the men for ordinary life insurance? Something may be said for accidents, but nothing for interference such as this would be. The men if compelled to insure against accidents would still, if prudent, be forced to protect themselves or their families against destitution in

cases of illness or death by natural causes, and they would be paying in this manner two different sets of premiums. The machinery would be expensive, doubly so, and the loss must come out of the pockets of the policy-holders either by increased premiums during life or by diminished returns to their representatives after death. To quote the words of one of the speakers in the discussion following on Mr. Brown's paper: "It was absolutely necessary for every one dependent for their income upon health and strength to make a provision for sickness and disability; but it was not desirable to fritter away their insurances by dispersing them over many societies; it was better to have one insurance, pay one premium, and settle it once for all."

These proposals as to joint payments by master and men would either by compulsory contributions ruin existing societies, and inflict an injustice on those who were forced to insure against death in any event, or else they would divide the payments, and increase the expenses as already pointed out. Another speaker pointed out a fresh reason against the adoption of the compulsory insurance system; his objection was based upon practical grounds, as he was himself by trade a carpenter, and he declared that the system would never work in his own trade, because if a workman were employed by any firm, the question would perforce be put to him whether he were insured or not, and the result of that would be that a means would be afforded to the master for ascertaining where the man had been previously employed, a consequence that would, he seemed to think, render the system unworkable. He further added that his trade had made provisions for accidents of every kind; if a member were killed, £20 was given; if he were disabled from future work, £100 was given; and where from natural causes, and not from the operations of his trade, a workman lost his eyesight, he was paid £50. But to make it compulsory to pay so much would drive individual freedom out of the ranks, nor would it work well.

(To be continued.)

NOTES IN THE INNER HOUSE.

THE case of *Crozier v. Macfarlane & Co.*, June 15, 1878, decides a question which has been raised in various Sheriff Courts throughout the country—the question, viz., what form a petition for the benefit of *cessio bonorum* is now to assume. As is well known, Sheriffs obtained jurisdiction over such applications by the Act 6 & 7 William IV. c. 56, section 3 of which provided that a petition should be presented setting forth certain statements; and the Act of Sederunt (6th June 1839) which followed upon that statute declares that this petition shall assume the form of a schedule

attached to it. The form is one simply of a petition such as still exists in the Court of Session, without condescendence or pleas in law attached. Accordingly, all *cessios* in the Sheriff Court have until recently followed the Act of Sederunt. The Sheriff Court Act of 1876, however, dealt *inter alia* with *cessios*. It amended the Act of William IV. in several respects. It provides that processes of *cessio bonorum*, which it terms actions, shall be instituted in the Sheriff Court only. The debtor is to be entitled to raise an action in the Sheriff Court praying for interim protection, and for decree of *cessio bonorum* under the Act of William as amended by this Act. The 6th section of the Sheriff Court Act provides that every action in the ordinary Sheriff Court shall be commenced by a petition, and a form of this petition is given, and "action" is defined to include every civil proceeding competent in the ordinary Sheriff Court. It was, however, contended that an application for *cessio* was not a proceeding in the ordinary Sheriff Court, but peculiar in its nature, and that the form provided by the Act was unsuited to it. That form commences by setting forth the names of the pursuer and defender, whereas in a *cessio* there is no person occupying the position of a defender. Further, it was urged that the Act of William IV. was not repealed, and that *cessios* were still under its provisions, except as amended by those of the Sheriff Court Act. In Glasgow, where *cessios* are matters of everyday occurrence, the point has been repeatedly raised. In one case Sheriff Clark refused to throw out as incompetent a petition framed upon the old model. In the case of *Munro*, reported in the June number of the *Journal*, p. 325, Sheriff-Substitute Scott Moncrieff of Banffshire sustained a petition in the form of the Sheriff Court Act, but his judgment was reversed upon appeal by Sheriff Bell, whose note contains an elaborate argument in favour of abiding by the Act of Sederunt. About the same time Sheriff Campbell of Ayr, taking an opposite view, had in the case of *Crozier* rejected a petition because it was under that Act of Sederunt, and fortunately this case came before the Court of Session, when the First Division unanimously, and apparently without the slightest hesitation, decided that Sheriff Campbell's view was the sound one, and that a petition for *cessio* cannot be looked at unless framed under the Sheriff Court Act. As the Lord President put it, "the question simply comes to be, Is a *cessio bonorum* a civil proceeding competent in the Sheriff Court? That it is a civil proceeding there can be no question, and that it is competent is very clear, for under the 26th section of the Act it is not competent anywhere else than in the Sheriff Court. The inference is too clear for dispute." This decision quite follows that in the case *M'Dermott v. Ramsay*, Dec. 9, 1876, 4 Exch. 217, in which it was held that a petition under sec. 6 of the Sheriff Court Act for the apprehension and detention of an apprentice was competent. Taking these two cases it may now be held that this Act applies to any procedure, whether sum-

mary or not, which takes place in the civil as distinguished from the criminal Court of the Sheriff.

The case of *Macfarlane v. MacNair and Others*, decided by the First Division on 19th June last, adds another to the long series of decisions relating to the delivery of deeds. It was there held that where a husband had out of his own funds advanced a sum upon an assignation in security in favour of himself and his wife and the survivor, and the assignation was found in his repositories after his death, there had been no delivery to his wife so as to divest him of the right to the sum in his lifetime. It was proved that this assignation was kept in a drawer to which both husband and wife had access.

The case of *Campbell v. Campbells*, decided by the First Division upon the same day, raised an important point, although not a novel one. A marriage contract contained the usual clause by which the spouses mutually, or the survivor, is empowered to divide the funds amongst the children. The surviving spouse had in this case executed a deed of apportionment which ignored the representatives of a son who had died intestate and unmarried. Notwithstanding the fact that this deceased child was represented solely by his brothers and sisters, who were provided for under the deed, the Court held that this deed fell to be reduced as disconform to the terms of the marriage contract. They did so with evident reluctance, but the view they took was that the point had been already settled by the case of *Watson v. Marjoribanks*, Feb. 17, 1837, 15 Sh. 586, which was recognised as a leading authority. Lord Deas came to this conclusion "very unwillingly." In *Marjoribanks'* case the representatives of the deceased children ignored in the deed of apportionment were executors nominate and creditors, but it was thought that this difference between the facts of the two cases did not affect the principle, which, as explained by the Lord President, was "that the omission from the deed of apportionment of one of the objects of the power is fatal to the exercise of the power."

With what surprising vigour does the Poor Law ever bring forth fresh points for discussion and decision which, if they bear a family likeness to what have appeared before, still present some feature more or less novel. In *Greig v. Young*, June 21, the Court were called upon to consider the settlement of an illegitimate pupil child born while the mother was in jail. The mother had come to Edinburgh after the birth of her child only to be again incarcerated, leaving the child destitute. Edinburgh afforded relief, and sought to recover from Perth, in which parish the child had been born. The Court was clear that Perth was not liable. The case was held to be governed by the decision in *Macrorie v. Cowan*, March 7, 1862, 24 D. 723. In that case it was held that a married woman had no settlement apart from that of her husband, and then they held that an illegitimate child could have no settlement apart from that of its mother, the only parent recognised by

law. The parish therefore in which the mother had either a birth settlement, or had acquired one, was indicated as the parish liable.

The case of *Wilson v. The Glasgow Tramway and Omnibus Company* (Second Division, June 22) is one certainly deserving of attention, as bearing upon the important question of the jurisdiction of Small Debt Courts, and it will have the effect of still further discouraging appeals from these tribunals. The pursuer was a conductor in the employment of the defenders, and had signed an agreement by which, *inter alia*, the secretary and a managing director were declared to be the sole judges in any question arising between the company and the pursuer as their servant. The pursuer was dismissed, and brought an action for his wages in the Small Debt Court of Glasgow, when the defender took the plea of no jurisdiction, in respect that an award had already been pronounced such as this agreement provided for. The Sheriff nevertheless allowed a proof, and in spite of the award, which had been against the pursuer, decerned in his favour for a certain sum. The case was appealed to circuit, and certified to the Second Division. The importance of the case lies in the view which the Court took of their right of reversing such judgments. It is well expressed by the Lord Justice-Clerk. In his opinion they had not to consider whether the Sheriff had acted rightly in setting aside the award and deciding the case, because that would be to enter upon the merits of the case. He hints that the Court might have been disposed to uphold the award had the question come before them directly, but then the Sheriff was entitled in the Small Debt Court to consider the point for himself. He had done so, and it was immaterial whether he was right or wrong in doing so. "Unless," he observes, "in a state of circumstances very unusual, the decision of the Sheriff pronounced in the Small Debt Court, in which the procedure is regular in point of form, and in which his jurisdiction is undoubted, ought to be regarded as final, without considering whether he has decided rightly." According to Lord Gifford, this plea taken by the pursuers was like the plea of prescription or of compromise—a plea which the Sheriff was called upon to consider, and either give effect to or set aside. He had done this and set it aside, and the Court was excluded by statute from inquiring into the soundness of his decision. With all deference, it is somewhat difficult to see how, upon the views of Lord Gifford, a Small Debt decree could ever be set aside upon the ground of incompetency or want of jurisdiction. These are pleas which his Lordship seems to hand over to be dealt with solely by the inferior judge, and he does not leave the Court any ground upon which the right of review can be exercised. The Sheriff might reject the plea of prescription, and allow parole evidence of prescribed debts, or be disposed to entertain cases beyond the limit of the Small Debt Act, or defy the decision of superior Courts, and yet be only doing what Lord Gifford says he has a right to do unchallenged.

These extreme cases were not overlooked by the learned Judge, who, however, was of opinion that they would fall under the head of oppression, or perhaps of legal corruption. But it is not difficult to imagine cases in which no such plea could with any decency be advanced. Lord Ormisdale rather inclined to have an inquiry made into the proceedings before the Sheriff, but did not dissent from the opinion of his brethren upon the main point. One or two other points deserve notice. The Lord Justice-Clerk was inclined to hold that the 11th section of the Sheriff Court Act of 1877 applies to the Small Debt Court as well as to the ordinary Court of the Sheriff. Lord Gifford indicated a similar leaning. But Lord Ormisdale was not prepared to say that it did apply. Our readers are also aware that this section enables parties to get over formal deeds in the Sheriff Court by way of exception. It is in our humble opinion to be regretted that such a power was ever given, or at least that it was not confined to the Small Debt Court. It opens the way to desperate attempts to set aside deeds executed with due formality, and deprives the possessor of a bill or bond of that security which he was entitled to expect. The difficulties in the way of an action of reduction made people hesitate before they denied their own signatures and repudiated solemn obligations. But apart from this Act, Lord Gifford would seem to favour the idea of a Small Debt judge sitting loose to legal restrictions upon the mode of proof. He says: "It would be rendering the Small Debt Acts nugatory if every time formal writing is founded on in these Courts, the Sheriff's hands were tied, and he was precluded from all inquiry, unless actions of reduction or similar actions were first brought in the Court of Session. The formality of the alleged writing makes no difference. A bill or receipt *in re mercatoria* is as privileged as a tested deed, and I should be very slow to hold that the Sheriff cannot get behind receipts or bills when the justice of the case requires it without an action in the Court of Session." Another point raised in this case had reference to the 3rd section of the Employers and Workmen Act, 1875, which enables a judge to rescind a contract made between an employer and employee if, having regard to all the circumstances of the case, he "thinks it just to do so." The Court held that a person in the position of the pursuer in this case fell under the definition of workmen under section 10 of this Act.

In the case of *Ross v. Ross* (June 29) an arrestment of 9s. 3d. standing at the credit of a defender in the books of a bank, being interest on an account formerly held there, was held to be effectual as an arrestment *jurisdictionis fundandæ causa* in a petitory action raised against him. The Court went here upon the authority of the case of *Shaw v. Dow & Dobie*, Feb. 2, 1869, 7 Macp. 449, in which it was held that a debt of £1, 8s. 6d. having been arrested was sufficient to found jurisdiction to the petitory conclusions. The Lord President said: "Unless the thing arrested be really of no value

at all, I think the smallness of the amount is no relevant objection to the foundation of jurisdiction." In that case the question whether an arrestment to found jurisdiction would found it in cases of reduction was raised but not decided.

LIABILITY OF ADJOINING PROPRIETORS FOR INJURY TO OR BY ANIMALS.

(From the "Irish Law Times.")

"WHEN one is sued for killing his neighbour's hog, he cannot plead the bad character of the hog as a defence." Such is the syllabus of the report of *Ussery v. Pearce*, decided last year by the Texas Court of Appeals, where thus speaketh White, J.: "The appellants were endeavouring to keep and 'run a hotel' in the town of Oakville, without having a fence or enclosure around their house. There being nothing to prevent their free egress or ingress, the hogs of their neighbours, as was quite natural, finding the kitchen door open, would at times enter, eat, and dispose of such provisions as they found lying around loose, and sometimes break up the dishes and destroy the furniture. Defendants alleged in the plea which was stricken out, that by these unwarranted outrages the hogs had, first and last, during the year, damaged them in the sum of one thousand dollars. It is astonishing, if not altogether incredible, that defendants would have witnessed and patiently suffered all this great and serious loss, when they could, for a few dollars, perhaps, have purchased the hogs and then killed them, or could have fenced in their house with a substantial enclosure, which would have been hog-proof. If they did not wish to go to this trouble or expense, to say the least of it they might have kept the kitchen door shut and securely fastened against these destructive intruders. There was no sufficient excuse for killing the hogs, and, under all the circumstances detailed in the statement of facts, we think the verdict and judgment extremely mild." Whence it appeareth that the hog is a favourite of the law in Texas. Nor is the Supreme Court in North Carolina wanting in due consideration for that interesting animal. Saith the Court in *Morse v. Nixon* (6 Jones, N. C. 293): "We do not concur in the opinion of the Court below as to the right of killing hogs that are in the habit of eating chickens. The position that such a hog is a public nuisance, and may be killed by any one, is not supported on principle or authority, and, if recognised, would lead to monstrous consequences. Allow such a right, and the peace of society cannot be preserved, for its exercise would stir up the most angry passions, and necessarily result in personal collisions. It may be the killing will be justified by proving that the danger was imminent (to another chicken), making it necessary 'then and there' to kill the

hog, in order to save the life of the chicken, or prevent bodily harm; but we are inclined to the opinion that, even under these circumstances, it is not justifiable to kill the hog. It should be impounded or driven away, and notice given to the owner, so that he may shut it up. At all events, this course is dictated by the moral duty of good neighbourship." Whence it appears that hogs of a predatory disposition must be allowed to indulge in an occasional chicken, because otherwise the peace of society could not be preserved. It is pleasant to be able to add that the right of dogs to a "first bite" is also fondly recognised across the Atlantic, and that the moral duty of good neighbourship does not preclude the keeping of ferocious brutes which have not had that satisfaction: *Mann v. Wieand*, 34 Leg. Int. 77, and cases there cited. But a Michigan dog must have a "licence" to practise, and must wear a collar round its neck; otherwise under a statute of 1873 "any person may, and it shall be the duty of every police officer and constable of any township or city to kill" the defaulter. This, however, will not justify one dog in killing another of his own motion, as was gravely decided by the Supreme Court in *Heisrodt v. Hackett* (3 Central L. J. 479), where saith Marston, J.: "The plaintiff in this case was engaged in the business of raising berries for market. His profits depended largely upon protecting the berries from naughty birds, who, having no moral or conscientious scruples or respect for plaintiff's interests, would sometimes descend and without leave or licence appropriate the berries to their own use. To prevent such high-handed dealings the plaintiff became the owner and possessor of a small, amiable, and intelligent dog, with valuable hunting qualities. This dog, when the birds attempted to steal or take the berries, would at once warn them of the danger they incurred, and they, upon seeing him approach, would immediately withdraw without waiting for the honour of a near acquaintance, so that not one of them would get a peck of the berries during the whole season. This dog had business everywhere around the plaintiff's premises, in watching and protecting them, bolting in and out of all the rat-holes, catching and killing the occupants if he could, but at the risk of soiling or losing his collar by the operation. There was a large, savage, and dangerous dog, a cross between a bulldog and a mastiff, living near by the plaintiff's residence. This was a dog without an owner; he was permitted to live, and was taken care of on defendant's premises. Upon the 1st day of January 1875 he went out making calls. The same day, plaintiff's little dog was out attending to his duties, pursuing or chasing a flock of snow-birds from off plaintiff's fields and berries, and while engaged in this laudable business, he followed the birds across the highway and into the field of a neighbour, where it does not appear there were any berries. While there, defendant's dog wilfully and maliciously attacked him, and with dangerous weapons, to wit, his teeth, so bit and injured the

plaintiff's dog that his bark was shattered; he went home in a languishing condition, and languishing, upon the same day did die. Plaintiff thereupon sued defendant to recover damages for the irreparable loss which he had sustained. The defendant justified his dog in what he had done, under the statute of 1873, section 6. It does not clearly appear from the record what the particular part of this section defendant's dog was, or claimed to be, acting under, when he committed the deadly act. He seems to have considered it his duty to kill the plaintiff's dog. Yet it is not clear from the record, and I am not satisfied we have any right to presume that he, defendant's dog, was either *de jure* or *de facto* a police officer or constable, and if he held neither of these positions at the time, then clearly it was not his duty to act in so summary and severe a manner. We are satisfied he does come under the other clause which permits 'any person' to kill such animals, and shall, therefore, dismiss that branch of the case from further consideration. Neither are we satisfied that defendant's dog had sufficient intelligence or discretion to act in an official capacity in such cases. As an officer, if he claimed to act in that capacity, he only had the right to kill plaintiff's dog in case he found him 'going at large, not licensed and collared' according to the Act. Now, whether defendant's dog had examined the records and ascertained from such examination that plaintiff's dog was not licensed, or whether he stopped and deliberately examined plaintiff's dog to see if he had a collar on, does not appear. Nor does it clearly appear that he killed him for the sole reason that he was not licensed and collared. Yet he had no right to kill him for any other reason. If, for the sole reason that plaintiff's dog was not licensed or collared, defendant's dog, in the performance of his official duty, killed him, then, were it not for other considerations, his owner or possessor might be held not liable. If, however, there was not that coolness and deliberation which the law would require, but the act was prompted by or sprang from a wicked, depraved, and malignant disposition, then the act could not be justified. Nor do we think that the owner, in any case, would be prevented from recovering if his dog was licensed and he had kept a collar upon him, in a case where the collar, without his knowledge, in some way, either accidentally or otherwise, got off, until at least a reasonable time thereafter had elapsed to enable him to discover the fact and replace it. It will be noticed that while the statute requires the dog to wear a collar, it does not prescribe the kind. If the plaintiff had put a paper collar upon his dog, experience teaches us that it would become soiled, and that frequent changes would become absolutely necessary. If, under such circumstances, plaintiff had taken off the old, in order to put on a clean collar, and while in the act defendant's dog, standing by and seeing the old collar taken off, could he, at once before plaintiff had time to replace it, bounce upon and kill plaintiff's dog? We think not. Or if plaintiff's

dog, in pursuit of rats, had torn or destroyed his collar, could the defendant's dog, watching for such an opportunity, take advantage of the circumstance and kill him, before his owner had an opportunity to discover the fact, and replace it? We are of opinion that no such severe and deadly construction can be given the statute."

Having duly considered the controversy between the dogs of Heisrodt and Hackett, we shall next introduce Mervyn's rams. Mervyn's rams once ventured to trespass on Cargill's land, and caused damage by mixing with his merino ewes, and getting them with lamb. Question: Was it as much a natural and ordinary consequence of the trespass that they should get the ewes with lamb, as that they should eat and trample down the grass; and was it necessary in such case to prove a *scienter*? Whereto answers Williams, J., as reported in the *New Zealand Jurist*: "The law as to the trespass of cattle is clearly laid down by Williams, J., in *Cox v. Burbidge*, by Blackburn, J., in *Fletcher v. Rylands*, and by the Judges of the Court of Common Pleas, in *Ellis v. Loftus Iron Co.* There is a duty on a man to keep his cattle in; if they get on another's land, it is a trespass, irrespective of any question of negligence, and the owner is liable for the trespass. I take it that if rams trespass in a field where there are ewes, it is as much a natural and ordinary consequence of the trespass that they should get the ewes with lamb as that they should trample down and eat the grass. If by ewes becoming with lamb, the owner of the ewes suffers loss, as that loss was natural, in consequence of the trespass of the rams, I cannot see on what principle the owner of the rams should escape liability. As it is unnecessary to prove negligence, so it is unnecessary to prove a *scienter*, because every one is presumed to be aware of the natural instincts common to all animals:" *Cargill v. Mervyn*, 2 N. Z. Jur. N. S. 50.

Travelling back from those remote latitudes, we shall now refer to some English cases. Passing over the early and familiar cases, with respect to cattle getting in through defective fences, referred to by Mr. Carleton in his recent work (p. 285), and by Mr. De Moleyns in the new edition of his treatise (p. 315, where, by the way, he still insists on misquoting Milton), it will suffice to briefly mention some recent cases on the subject of this paper which are not alluded to in those works. In *Laurence v. Jenkins* (L. R. 8 Q. B. 274, 42 L. J. Q. B. 147, 28 L. T. N. S. 406), decided in 1873, the facts were as follow: The defendant was the occupier of a close adjoining a close occupied by the plaintiff. The defendant's close was woodland, and he sold the fallage of the timber to H., continuing himself to occupy the close. H. felled a tree in a negligent manner, so that it fell over the fence between the two closes, and made a gap in it. Two cows of the plaintiff soon afterwards got from the plaintiff's close through the gap into the defendant's close,

and fed on the leaves of a yew-tree, which had been felled there by H., and died in consequence. The defendant had no notice of the fence having been broken down before the escape of the plaintiff's cows. There was evidence that the defendant and his predecessors had for more than forty years repaired the fence (which was on his land) between the two closes whenever repairs were necessary; and that for the last nineteen years the fence had been repaired by the defendant and his predecessors upon notice by the occupier for the time being of the plaintiff's close. Whenever the fence was so repaired, it was for the purpose of preventing cattle on the plaintiff's close from escaping into the defendant's close. It was contended for the defendant that, conceding the cause of action to be founded on the prescriptive obligation to fence as against the plaintiff's cattle, still the defendant could not be held liable without having reasonable time to mend the fence after notice of the defect, which notice was expressly negatived; and that the defendant was not liable for the negligence of H., as, though he had authorized the felling of trees, he had not authorized the felling of the tree in question in the mode in which it was felled. After deciding that the damage was not too remote (*cf. Dawson v. Mid. Ry.*, L. R. 8 Ex. 8, *Sneesby v. L. & Y. Ry.*, L. R. 9 Q. B. 263, 1 Q. B. D. 42), Archibald, J., in delivering the judgment of the Court, said: "We have come to the conclusion that the defendant was bound at his peril to maintain at all times, and without notice to repair it, a sufficient fence; and that, except in the case of damage by the act of God or *vis major*, he would be answerable for damage sustained by cattle escaping from the plaintiff's close, by reason of the defective state of the fence, and proximately due to that cause. At common law the owners of adjoining closes are not bound to fence either against or for the benefit of each other; but, in the absence of fences, each owner is bound to prevent his cattle or other animals from trespassing on his neighbour's premises. By prescription, however, a landowner may be bound to maintain a fence upon his land for the benefit of the occupier of the adjoining close." After referring to authorities to this effect, and establishing that in such case liability would attach for injury to animals occasioned by omission to fence, he added: "In all those cases, however, the prescription to maintain and repair obviously implies the pre-existence of the fence, and the right, consequently, to have it always existing as a fence—in other words, in a condition sufficient both to prevent the cattle of the owner entitled to it from escaping out of his close, and also to protect him from trespasses by his neighbour's cattle, and renders it, we think, incumbent on the party upon whom the prescriptive obligation is imposed to repair the fence in time to prevent its becoming defective, and subjects him to all risks of injury that may be done to it by strangers or trespassers. We think, therefore, that, as the true nature of the prescription is that the defendant was bound at his own risk to

have a sufficient fence always existing, he was liable to the plaintiff notwithstanding he had no knowledge of the injury done to the fence." We may add that the same obligation between adjoining proprietors, as to keeping in cattle, applies where one is landlord to the other: *Erskine v. Adeane*, L. R. 8, Ch. 756, 762; and that the obligation does not extend to all cattle whatever, but only those of the neighbours, and those rightfully on the adjoining land: *Rust v. Low*, 6 Mass. (Amer.) 90.

"Law," saith old Owen Feltham, "is the bridle of the Humane Beast, whereby he is held from starting and stumbling in the way. It is the Hedge on either side of the Road which hinders from breaking into other men's propriety"—i.e. property. But somehow the Humane Beast finds a good many gaps in the Hedge aforesaid, and in *Wilson v. Newberry* (L. R. 7 Q. B. 31, 25 L. T. N. S. 695) succeeded in driving a demurrer right through it. In that case, which was decided in 1871, the defendant demurred to a declaration which averred that the defendant was possessed of yew-trees, the clippings of which he knew to be poisonous, and that it was the duty of the defendant to prevent the clippings from being placed on land not occupied by him, where his neighbour's horses might be enabled to eat them, yet the defendant took so little care of the clippings that the same were placed upon land not occupied by him, whereby the horses of the plaintiff were poisoned. But it was not alleged that the defendant clipped the trees, nor that he knew they were clipped, nor that he had anything to do with the escape of the clippings on to his neighbour's land; in fact, the cuttings might, consistently with the averments, have been done by a stranger without the defendant's knowledge. And, accordingly, the Court held that the duty charged could not be deduced from the facts as pleaded, and, therefore, that the declaration was bad. "The case of *Fletcher v. Rylands* (L. R. 3 H. L. 330)," observed Mellor, J., "has no analogy to this case. The foundation of the doctrine there laid down is derived from an old case in Salkeld (*Tennent v. Goldwin*), in which it was determined that it was the duty of a man to keep his own filth on his own ground. If a person brings on his own land things which have a tendency to escape and do mischief, he must take care that they do not get on to his neighbour's land. This is a very different proposition from that which has been contended for on behalf of the plaintiff; it is that where a person has yew-trees growing on his land which are clipped by some means, he must prevent the clippings from escaping on to his neighbour's land, and from being placed there by a stranger. I do not think that the facts alleged cast any duty of this kind upon the defendant."

Fletcher v. Rylands, having been thus rightly distinguished from cases of this kind, need not be here further noticed; it, and some cognate cases, may form the separate subject of a subsequent paper; but we may quote, *en passant*, an observation by Bramwell,

B., in *Nicholls v. Marsland* (44 L. J. Ex. 174, L. R. 10 Ex. D. 255), where *Fletcher v. Rylands* was also distinguished. "I am by no means sure," said the learned Judge, "that the comparison of water to a wild animal is exact; I am by no means sure that if a man kept a tiger and lightning broke his chain, and he got loose and did mischief, that the man would not be liable." But in *Fletcher v. Rylands* water was, certainly, put in the same category with beasts wont to rove and do mischief; so, in the American case of *Garland v. Towne* (55 N. H., but see *Loose v. Buchanan*, 51 N. Y. 476), and in *Smith v. Fletcher*, 7 Ex. 305.

In *Firth v. Bowling Iron Works Co.* (3 C. P. D. 254, 38 L. T. N. S. 568, 47 L. J. C. P. 358), the facts were as follow: The plaintiff and the defendants, the lessees of a colliery, occupied adjoining lands under the same lessor; defendants having covenanted in their lease to fence and keep fenced their lands for the benefit of the lessor and his tenants. The defendants had fenced their land, accordingly, with old wire rope, originally put up by former tenants of the colliery twenty years before. Fragments of this fencing, the condition of which was known to the defendants, having become detached by rust and decay, fell on to the plaintiff's land, on which a cow was grazing, and some of these fragments, being accidentally swallowed by the cow, caused its death. The plaintiff, accordingly, claimed to recover damages from the defendants, who resisted, on the ground that they were bound only to keep their fences in such a state as would prevent the cattle from straying, and were not responsible for the indirect consequences of decay in a fence which was sufficient for this purpose, citing *Wilson v. Newberry*, *ubi supra*. That case was, however, distinguished by the Court, and rightly, as we consider, on the ground that there it did not appear from the declaration that the yew-tree was growing near the fence, while, for aught that appeared, the clippings might have been placed on the land by a third person (*cf.* cases commented on *ante*, p. 333, and *Harrison v. Collins*, *ante* p. 367). In *Firth's* case, on the other hand, it was the fence itself which was in a defective condition, to the knowledge of the defendants, and the detachment of the fragments was the natural result of that condition, existing contrary to the defendants' distinct obligation. Nevertheless, unless the death of the cow was the natural and direct consequence of the condition of the fence, the defendants would not have been responsible, any more than the blacksmith in the ancient case for the plaintiff's loss of a wife, by reason of his horse casting a shoe while hasting to the wedding, whereby he was belated and his affianced married another. But it would seem that the facts in *Firth's* case, it appearing that two heifers had previously lost their lives from the same cause, showed that it is nothing out of the ordinary way for cattle to yield to the temptation of grazing on strands of wire, and if so, of course, the consequent damage would not be too remote. The Court (Lindley and Denman, JJ.) held the

defendants liable, Lindley, J., saying: "The facts are that the fence was made of wire rope, and that the nature and condition of the wire was known to the defendants. The natural result of the condition of that wire fence was that certain fragments became detached, and fell upon the land of the plaintiff. The natural result of those fragments falling upon the land of the plaintiff was that the plaintiff's cow swallowed them with the grass on which she was grazing. The death of the plaintiff's cow was, therefore, the natural and direct result of the condition of the wire fence, which must have been known to the defendants; and we think the defendants are liable for the natural consequence of that which they did or omitted to do." *Q. E. D.*

Now, in our opinion, *Laurence v. Jenkins* (discussed *ante*, p. 376) is in some respects rather dubious, *Wilson v. Newberry* is intrinsically inconclusive, and *Firth v. Bowling Iron Works* was inadequately argued and very loosely considered; and we shall, therefore, anxiously await some further adjudications on the questions involved in those cases respectively, especially in the interests of Irish cattle—"agile and imaginative, impatient, like their masters, of restraint," according to Mr. De Moleyns (*Practical Guide*, 315), and, he should have added, possessed of refined ideas on constitutional questions, as evidenced by Queen Méav's bull, which, as it is written in the old chronicle, "not deeming it honourable to be under a woman's control," went over and attached himself to Ailill's herds. As for our volatile dogs,

"Which sometimes, like their masters too,
Affect 'fresh woods, and pastures new,'"

it is satisfactory to know that, although an action will lie against an owner, who, knowing that his dog has a *penchant* for chasing and destroying game, permits it to be at large, in consequence of which it "breaks and enters" a neighbour's close, and chases and destroys young pheasants there being reared under domestic hens (*Read v. Edwards*, 17 C. B. N. S. 245), yet, as Lord Ellenborough observes, "a dog does not incur the penalty of death for running after a hare in another man's ground, and if there be any precedent of that sort which outrages all reason and common sense, it is of no authority to govern other cases" (*Vere v. Ld. Cawdor*, 11 East, 569). The statement to the contrary in Oke's "Game Laws," 3rd ed., p. 47, if not wholly unwarranted, seems too broad. We may add that the magistrates of Newcastle, County Limerick, have laid a case on this subject before the Law Adviser for his opinion in reference to *Power v. Evans*, heard lately. However, we must not again enlarge on the subject of trespass by animals, discussed above (as to which may be noted the American cases of *Van Leuvere v. Lyke*, 1 N. Y. 515; *Dunkle v. Kocker*, 11 Barb. 387; *Stafford v. Ingersol*, 3 Hill, 38; *Wells v. Howell*, 19 Johns. 385; *Lyons v. Merrick*, 105 Mass. 71; *Angus v. Radin*, 2 South. 815; *Dolph v.*

Ferris, 7 Watts & S. 367); and we have only to add, in conclusion, that a case in point is now awaiting the judgment of the English Exchequer Division. We refer to *Crowurst v. The Amersham Burial Board*, argued on the 26th of June, in which an action was brought to recover damages for the death of a horse, caused by eating the leaves of a yew-tree which had grown and projected over the fence of an adjoining field, belonging to the defendants. The Lord Chief Baron (who considered that *Firth's* case had no application) observed that as the questions involved, on which there were authorities as far back as the Year-Books, were of considerable importance, it would be better to reserve judgment. We shall watch the result with curiosity to learn whether it will contribute a further check to that unamiable personage, whose obnoxious proceedings inspired the following verses in the *Canada Law Journal*:—

“Thy neighbour? It is he whose cows
Grow fat upon *your* grass,
Whose horned cattle calmly browse,
‘With sweet unconscious grace,’

In *your* potato-patch, and feed
With no felonious bent,
But *bona fide*—clearly freed
From aught of ill-intent.

Thy neighbour? It is he who digs
A well that draineth yours,
Lets loose his sod-uprooting pigs,
And floods you with his sewers.

He who, to malice much prepense,
To wilful injury prone,
Refuses to keep up his fence
Or keep his fowls at home.”

Reviews.

The Preservation of County Records: a Memorandum. By WILLIAM HECTOR, Sheriff-Clerk of Renfrewshire. J. & J. Cook, Paisley.

Jury Lists in Scotch Counties: a Memorandum. By WILLIAM HECTOR, Sheriff-Clerk of Renfrewshire. J. & J. Cook, Paisley.

Fiars Prices: a Memorandum. By WILLIAM HECTOR, Sheriff-Clerk of Renfrewshire. J. & J. Cook, Paisley.

THESE three modest memoranda are valuable not merely from their subjects, but as contributions by an author who has done

much to expiscate Scottish legal history. It is only in the full light of the history of our old legal institutions and their machinery that good and substantial reforms can be effected.

When "The Association of Sheriff and Commissary Clerks of Scotland" was instituted in 1877, Mr. Hector engaged to bring under notice of the Association some subjects within the scope of its objects that might be profitably considered by its members. The three memoranda whose titles are quoted at the beginning of this notice are the results of this undertaking by Mr. Hector, and they deserve the consideration of many more than the members of the Sheriff-Clerks' Association.

Mr. Hector hesitates to say where the responsibility of providing accommodation for the County Records rests, but we never heard it doubted that it rests on the county; just as in a burgh the magistrates are the parties responsible for Burgh Records. Further, the Sheriff and Town-Clerks, as the custodiers of and responsible for these records, are (under the supervision of the Justiciary Judges and the Lord Clerk-Register) the parties to enforce the obligations of their counties and burghs. Accordingly the Act 49 Geo. III. c. 42 contains these provisions (§§ 10 and 11), which curiously enough Mr. Hector has forgotten to notice:—

"§ 10. And be it further enacted that the Sheriffs-Depute and Stewarts-Depute of the several shires and stewartries, or their substitutes, shall at least once in every year carefully examine into the progress and state of all the different records framed and kept by the respective Sheriff-Clerks and Stewart-Clerks, and shall prepare exact reports in writing, setting forth the result of their examinations, and particularly specifying the state and situation of the buildings in which the records of their respective shires and stewartries are kept, and how far the laws and regulations relative to the several records have been faithfully and punctually executed and obeyed; and the Sheriffs-Depute of the several shires of Edinburgh, Haddington, and Linlithgow, or their substitutes respectively, shall in the month of November in every year present such reports duly authenticated to the Lords Commissioners of Justiciary at Edinburgh, and the Sheriffs-Depute and the Stewarts-Depute of the other shires and stewartries, or their substitutes respectively, shall present their said reports duly authenticated to the Lords Commissioners of Justiciary at the Circuit Courts that shall be holden within their respective bounds in the autumn of every year; and the said Lords Commissioners of Justiciary are hereby empowered to make such orders thereon, or direct such further inquiries to be made as may appear to them to be necessary, and direct their clerks to enter the same in the minutes of the Court, and thereafter to transmit the several reports, with a certified copy of the orders that may have been made by them thereon to the Lord Clerk-Register, at whose instance it shall be competent to present to the Lords of Council and Session summary complaints

against any of the Sheriff-Clerks or Stewart-Clerks, or their deputies, on account of any neglect or malversation in the business of the several records committed to their care, and for redressing and punishing the same according to law.

"§ 11. And be it further enacted that the Chief Magistrates of the said Royal Burghs respectively shall at least once in every year carefully examine into the progress and state of all the different records framed and kept by the respective Clerks of such Royal Burghs, and shall prepare exact reports in writing in the manner above directed in the case of Sheriff-Clerks and Stewart-Clerks; and such Chief Magistrates shall in the month of November in every year transmit such reports to the Lords Commissioners of Justiciary at Edinburgh, who are hereby empowered to make orders and direct inquiries in the manner above provided in the case of Sheriff-Clerks and Stewart-Clerks as aforesaid; and the Clerks of Justiciary shall in like manner transmit such reports with a certified copy of such orders to the Lord Clerk-Register, at whose instance summary complaints may be made against Clerks of Royal Burghs in the manner above directed in the case of Sheriff-Clerks and Stewart-Clerks as aforesaid."

These are very important provisions. Mr. Hector is not the only person who seems to have forgotten them. No less a personage than the Home Secretary has ignored them in the Bill he has lately introduced, and withdrawn, abolishing the official supervision of the records by the Lord Clerk-Register. It is to be hoped that in any future measure not only will a continuance of the reports and supervision be provided for, but a recognition by statute of the obligation—left to rest at present on the common law—by which the counties and burghs are liable for all the expenses connected with the keeping and preservation of their records.

It may be the case, but it is not known whether the Statutory Reports by Magistrates of Burghs are regularly demanded by and given in to the Justiciary Judges. But whatever may happen as regards the Magistrates of Burghs, the reports by the Sheriffs to the Justiciary Judges are regularly demanded and given in, and action taken thereupon where necessary. The statute, it will be observed, puts Sheriff-Clerks and Town-Clerks on precisely the same footing, and in an action brought by a spirited Town-Clerk against his Magistrates (*Finnie v. M'Intosh, etc.*, 15th July 1868, 6 Macp. 1066) the Court laid it down: "These gentlemen must have known, or at least ought to have known, that the Town-Clerk as a public officer has the custody of the Burgh Records and papers entirely independent of the Town Council, except in so far as might be necessary to give access for legitimate purposes. The custody is with the Town-Clerk and no one else, and he is responsible to the burgh and to this Court for that custody." There are, unfortunately, no funds available to Sheriff-Clerks any more than Town-Clerks, or indeed to any subject other than

their own pockets, for vindication of their rights and the rights of the public, subject to the right to recover in the event of success. To Sheriff-Clerks we commend the example of the Town-Clerk of Fortrose. Mr. Hector has to a certain extent displayed that spirit as regards his own County Records, and we did not expect the deplorable helplessness which he attributes to Sheriff-Clerks generally. Of course, like all reformers nowadays, his recommendation to Sheriff-Clerks is not to help themselves, but to get Parliament to help them.

A similar panacea is what Mr. Hector recommends as regards the making up of Jury Lists. It is still less needed here than as regards County Records. The Sheriff is the person responsible for the state of the Jury Lists, and not the Sheriff-Clerk, as Mr. Hector assumes. No Sheriff has as yet experienced any difficulty when he ordered the Sheriff-Clerk to make up a new jury list, the Sheriff supervising the same and signing it on adjustment. The Exchequer allowance to the Sheriff-Clerk, or his assistant, for this work is not extra liberal, and that is the real evil, but it is to be hoped it does not require an Act of Parliament to remove it. Sheriffs are the parties to blame if the Jury Lists are not sufficiently often revised.

The Fiars Prices are in Mr. Hector's memorandum likewise treated from a Sheriff-Clerk's point of view. At the same time it is only fair to say that he has added criticisms founded on the history of these inquiries to fix the Fiars. The imperfections of the present system are very much owing to the fact that these inquiries have this peculiarly interesting antiquarian feature, that the jury are not judges but witnesses—witnesses declaring their verdict from their personal knowledge, while it is the principle of the modern jury trial that the jury shall not use their personal knowledge, but give their verdict according to the evidence laid before them by others. Gradually has the attempt been made, but without any direct authority, to change the old Fiars Jury trial into a modern one by leading evidence before them. It is this unauthorized change which has led to all the difficulties in reference to juries and witnesses which Mr. Hector marshals before his reader. The expense of Fiars Courts falls of course upon counties, like all other expenses of the Sheriffs which are not otherwise provided for, except in cases where there are Crown duties to be ascertained by the Fiars Prices, and there the counties are recouped their Fiars Court expenses through the Sheriff in Exchequer. Accordingly in the "County General Assessment (Scotland) Act, 1868," 31 & 32 Vict. c. 82, the assessment which was substituted for the rogue-money (hitherto levied under the combined operation of 11 Geo. I. c. 26, § 12, and usage) was declared liable to "the expenses connected with the holding of the Court for striking the Fiars Prices for such county, in so far as the said expenses have hitherto been defrayed by such county."

together with a fee of three guineas to each of such professional accountants, not exceeding two, and a fee of one guinea to each of such other persons, not exceeding six, as shall be summoned by the Sheriff as witnesses at such Court, as such fees shall be certified under the hand of the Sheriff."

In this way, and rather unconstitutionally, a limit has been put at the instance of the county gentlemen upon the Sheriff's powers and duties as declared in the Act of Sederunt of 1723. These embraced not only the summoning the jury, who were to "return a verdict on the evidence submitted to them," "or of their own proper knowledge," but also the summoning "proper witnesses and other good evidence to be submitted before the jury concerning the price at which the several sorts of victuals had been bought and sold since 1st November immediately preceding, and also concerning all other good grounds of arguments from whence it might rationally be concluded by men of skill and experience what ought to be established as the just *Fiars Prices* of the said crop." Since 1868 the Sheriffs may discharge this duty, but if they bring more than six witnesses they must pay them out of their own pocket. And then the six witnesses allowed, of whatever eminence and however far they may be brought, and however long they may be detained, are not to be paid more than £1, 1s.

Mr. Hector here again is so buried in antiquarianism that he never mentions this latest statutory change as to *Fiars Courts*. This is the more extraordinary that his practice—or it should be stated to be his Sheriff's—is, besides a jury, "on which one or more accountants are always placed," to summon "two or more witnesses who are growers or purchasers of grain from *each parish in the county*," these parishes being at least thirty in number. Mr. Hector might let his brother Sheriff-Clerks into the secret of how he pays the twenty-four witnesses beyond the sacred six whom he summons. Or if he can get such witnesses in Renfrewshire for love, favour, and affection for the public service, the public spirit of such men should be proclaimed on the house-tops!

The omissions we have felt it our duty to point out in these memoranda speak to their superficial character. And Mr. Hector seems, especially in the memorandum as to the *Fiars Courts*, almost to admit this; for previous to legislative interference, he suggests "there should be an endeavour made, either by voluntary or by Parliamentary return, to obtain from every Sheriff-Clerk in Scotland a statement of the mode adopted in his county for arriving at the average *Fiars Prices*."

But is this necessary? The old system of jury trial, where the jury were witnesses as well as judges, has been abolished as regards every other inquiry, and why repair the old bottle instead of putting your wine into a new bottle? If a new system is to be introduced, should not the jury be dispensed with and affidavits got (to save the presence of witnesses) from growers or purchasers of grain to

be selected by the Sheriff? He would thereafter, with the assistance of a professional accountant as an assessor, strike the Fiars for the year. Provision might further be made by previous advertisement for discussions before the Sheriff as to changes in the Fiars to be struck, and the principles to be applied, so that an elastic and not a hard-and-fast system might be obtained. To effect this public improvement, the parsimonious enactment of the County General Assessment Act must be swept away, or if not, supplementary funds must be provided from another source. With a present to Mr. Hector of these hints, suggested by a slightly different view of the subject than he has taken, we adopt his concluding remarks: "If this object is of as much importance as I think it is and have endeavoured to prove, and if the present mode is found on inquiry to be defective, I would urge upon the Sheriff-Clerks' Association to give it their careful attention as one peculiarly within their sphere; and from no quarter could an application be made to the Government for improvement by legislative means which would be more likely to be attended to than from this Association; and if backed by representations from the counties, its success would be certain."

Obituary.

LORD COWAN.

It is our melancholy duty to record the death of the oldest surviving occupant of the Bench—John Cowan—lately a Lord of Session and of Justiciary, who died at Elmbank, near Edinburgh, on 1st August last.

Lord Cowan, who had attained the ripe old age of fourscore years, was born on 6th July 1798 at Ayr, with which town and county his family had been connected for many generations. Educated at Ayr Academy, an institution in which he ever after retained a grateful interest, he pursued his studies at the University of Edinburgh, and was called to the Bar in the year 1822. Without any adventitious aids whatever, but by sheer force of perseverance and ability, Mr Cowan soon obtained for himself a large and rapidly-increasing practice. His health, however, which was never robust, led him rather to seek the somewhat less exhausting duties of a Chamber Counsel, in which capacity his services were in greater demand than he was always able to supply.

In 1848 he was appointed Sheriff of Kincardineshire, which office he held till the year 1851, when he became Solicitor-General. This position he occupied however but for a few months, as on the death of Lord Dundrennan, in the same year, he was raised to the Bench under the title of Lord Cowan.

One of the ablest feudal and commercial lawyers of his day, Lord Cowan added to an accurate and profound knowledge of law a conscientiousness and force of character which gave great weight and influence to his decisions from the Bench. As a criminal judge, though somewhat severe, Lord Cowan rarely made any mistake in estimating the guilt or innocence of a prisoner; it was indeed a hopeless task for a counsel to endeavour to divert his mind from the main point at issue.

In his relations to the Bar, courteous to all, Lord Cowan may be said to have fairly won the hearts of his junior brethren. Doubtless remembering the time when, young and unknown, he had his own way to make, he was never without a word of sympathy and assistance for any young counsel pleading his first cause.

After three-and-twenty years of faithful service on the Bench, failing health compelled him to retire from active life in 1874. In his notification of Her Majesty's acceptance of Lord Cowan's resignation in January 1874, Mr Lowe, who was then Chancellor of the Exchequer, acquainted his Lordship that "the Queen has been graciously pleased to signify her approval of your long and valuable services." "At the same time," Mr Lowe continued, "I beg to express the regret of Her Majesty's Government that the administration of the law in Scotland will no longer have the assistance of your ability and judgment."

Though with strength much reduced, Lord Cowan continued to occupy himself in his retirement with works of active benevolence. President of the "Orphan Hospital" and of the "Edinburgh Ayrshire Club," and connected with many other charitable associations, he employed his remaining years in promoting their respective objects. "And so," in the words of one of his oldest friends, "after a life of high and honourable service, and an evening time of comparative leisure, happily and usefully spent in kindly offices to others, the aged servant has gone to his Master, entering upon that rest to which he looked forward with humble but joyful anticipation."

The Month.

Public Dinner to WILLIAM SHIRESS, Esq., Solicitor, Brechin.—The above gentleman, who is Dean of the Society of Procurators for Forfarshire (Forfar district), was entertained at dinner on the 30th July by a number of his professional brethren and other friends desirous of congratulating him on the fiftieth anniversary of his admission as a Procurator before the Forfarshire Sheriff Court. The chair was occupied by Alexander Robertson, Esq., Sheriff-Substitute, and between eighty and ninety gentlemen sat down to

dinner. After the usual loyal and patriotic toasts the Chairman, in proposing the health of Mr. Shireess, said :—

“ It is with some diffidence that I approach what is the toast of this evening. (Applause.) I could have wished that the duty had been intrusted to some one who had had a longer experience of the subject of this toast than I have had. You know that we are met upon this occasion from far and near with one common object, which is to rally round our old friend who sits on my right hand—(loud applause)—and to assure him of our congratulations upon this very interesting anniversary of his fiftieth year of active professional life. (Applause.) I think we all wish to take this opportunity of showing our esteem for him, not only as a legal practitioner, but as a gentleman and friend. (Applause.) Fifty years is a very long time in the span of any one man's life ; to have spent fifty years in the active pursuit of what I am sure you will sympathize with me in calling a laborious and arduous profession is what falls to the lot of very few men. There requires to be that amount of the *mens sana in corpore sano* which our friend Mr. Shireess most eminently possesses. (Applause.) To acquire success at the Bar—I hope you will pardon me as rather a younger member for talking in this way—to acquire success at the Bar requires a number of very valuable qualities and attributes. (Hear, hear.) You must begin a patient and laborious study of the law ; you must have also good temper ; you must have the power of expressing yourself in language ; and you must have also many other qualities which I shall call qualities of the head. (Applause.) I need hardly say that our friend Mr. Shireess possesses these to a very high degree indeed. (Applause.) He has attained the highest rank which it is in your power to give him—Dean of Faculty of your Society. (Applause.) Some men obtain success and eminence in their profession without retaining their popularity. There are some men who reach the top of the ladder by, as it were, considering every rung of the ladder a step to put their feet on, whether that step be a friend or a foe. Such men do not attain popularity. They may obtain success, but in weaving the web and web of life there are certain silver cords which go far to enhance the beauty of the fabric—such as the graces of sympathy, charity, kindness, and helpfulness to others. (Applause.) These are threads which our friend in his passage through life has not dropped, but has carefully gathered up. (Loud applause.) Mr. Shireess has the satisfaction of looking round this table to-night, not only saying I have gained a great many lawsuits, but I have lost no friends. (Applause.) I feel I must correct this last sentence. As was pointed out in a letter of apology we have heard read this evening, many have dropped down who started life at the same time as our friend, and it is impossible for him to look back over these fifty years without feelings of a mixed nature. He must feel that many have fallen in the strife who started with him in life—that many have dropped worn and weary in the battle of life who otherwise would have been here to-night. But such regrets are only natural to any man who has lived fifty years in the active exercise of his profession, and Mr. Shireess has no cause to be ashamed of these regrets, because he must have the conscious feeling that had these companions been spared they would have been here to-night to join us in wishing him every happiness. (Applause.) The relations between the Bar and the Bench are rather different in the provinces from what they are in the Supreme Courts, and naturally so. In the Supreme Courts, where questions of the greatest moment have to be discussed, and where there is little or no right of appeal, judges are selected from men of long-trying experience. They have gone through a long apprenticeship at the Bar themselves, and very properly the best men are selected and put on the Bench. By the time they reach that position they have comparatively little to learn from the Bar—rather the gain is all the other way. (Hear, hear.) In the provinces it is not quite so. The questions that have to be decided in the provincial Courts are of course to the litigants of great importance, but still they are of less magnitude than those which come

up in the Superior Courts, and then the right of appeal keeps in check the decisions that are given. Men are selected to preside in the Courts who have not the matured and tried experience of the Supreme Judges. They are men of more modest acquirements, and, I may add, of more modest salaries. (Laughter.) It is of very great advantage for a young man when he is selected for a post of that nature to find around him men of experience who can guide him, at any rate for some years, very much in his conduct of the business, and he naturally looks up to them for assistance in the early part of his career. (Applause.) I am proud to have this opportunity, I am thankful to have it—of telling Mr. Shiress, as I do now, how very much I owe, and have always owed, to him ever since I had the honour to fill the position I now occupy. (Applause.) Mr. Shiress has not only instructed me many a time in sound Scottish law, but he has always held up before me in himself an unflinching example of patience, courtesy, and unruffled good temper—(loud applause)—qualities, I think, that no judge need be afraid to imitate. (Applause.) I am going to be perfectly frank with you on this occasion, and particularly with Mr. Shiress. I am prepared to say that when I first came to Forfar I did not quite appreciate Mr. Shiress as I ought to have done. (Laughter.) There was a great deal of business to be done in those days, and, as it happened just when I was promoted to the Bench, there were a number of very troublesome and difficult questions, some of them from this part of the county. (Laughter.) I gave them the best of my attention—but, as you may know, the best of my attention was then very small—(laughter)—and I wrote what I thought most remarkably able decisions. (Great laughter.) I must say, however, that my friend Mr. Shiress thought otherwise, and he did all he could—and successfully too—to get them terribly cut up in the Supreme Courts. (Laughter.) I did not quite appreciate that at the time. (Laughter.) Then again every morning at ten o'clock—which was then the hour at which the Court met—there was Mr. Shiress at the Bar as neat and prim as if he had just left his toilet-table. (Great laughter.) Even at my Small Debt Courts—however remote and barbarous regions I went into; Kirriemuir, for instance—(great laughter)—there was Mr. Shiress waiting for me, with a large blue bag containing a most formidable lot of authorities. Well, I found myself saying a month or two after I came to Forfar, I really would be very happy at Forfar if it were not for this man Shiress. (Loud laughter.) You will excuse the frankness of this confession, but I warned Mr. Shiress before dinner that it was coming, because I hasten to make the *amende honorable*. In a short time I began to find that if I wanted a case fairly, relevantly, and shortly stated, Mr. Shiress was the man to help me. (Applause.) As I grew a little older, and got a little more sense, I began to find myself saying, What should I do without this man Shiress? (Laughter and applause.) I am glad indeed to have this opportunity of making this confession to him. (Applause.) It is very difficult in Mr. Shiress's presence to say all I would like to say; but I would not be doing justice to him were I not to remind you of the great services he has rendered to you as your Dean of Faculty. (Applause.) I consider you have been very fortunate indeed in having a man of such experience and sagacity as he is to look after your interests when the recent Act was being passed. I can myself speak as to the zeal and energy he displayed in your behalf when the new Court Houses were being built at Forfar to see that a comfortable room was provided for the legal gentlemen. Most of you will remember the wretched accommodation we had in the old place, where there was neither comfort nor convenience for agents. Mr. Shiress's exertion regarding the new Library you all know. (Hear, hear.) I do not believe the Library would have been in existence but for his unwearied efforts. (Applause.) Connected with the early part of my career there still remains a little haziness as to where Mr. Shiress used to live when he came so often to Forfar. (Laughter.) I was told he resided in Brechin; but that statement I felt unworthy of consideration. (Laughter.) It was impossible to believe that, seeing that he appeared every morning at the Bar—unruffled by the heat of summer, undis-

mayed by the snows of winter. I used to believe he had lodgings in a first-class carriage in a railway train—(laughter)—and I also thought he had a special truck to carry his authorities. (Great laughter.) I know Mr. Shirees would not wish me to make any fulsome compliments to him. I think I have said enough to express the feeling which I see by your faces you all have, which is that you congratulate him upon this very happy anniversary. (Applause.) We cannot wish him another, for the reason that most of us would be dead fifty years hence ; but we do wish that he may be long spared to act as Dean of Faculty—(applause)—and we do wish him continued professional success. (Applause.) I take the liberty also of wishing him domestic happiness, although I see that the proposer of the next toast will enlarge upon that point ; and I also wish him happiness in the highest and best sense, which I shall only venture to allude to on this occasion. (Applause.) I give you 'The health of Mr. Shirees, with all the honours.' (Loud and continued applause.)

Mr. SHIREES was warmly cheered on rising to reply. He said: "I certainly am very deeply indebted to our friend the Chairman for the very kind eulogy he has passed upon me and the many compliments he has paid me. I little expected, gentlemen, that I should have been asked to attend on an occasion of the present sort ; but I find that my excellent and esteemed friends, the members of the Procurators' Society, who had already done me so many honours—who in 1868 elected me Dean, and have annually repeated that election ever since—had somehow or another learned from tell-tale rolls of the Court that it was fifty years since I entered the profession. (Applause.) It is not agreeable to one sometimes to think that all the world knows how old he is—(laughter)—and the intimation that my fiftieth anniversary was to be thus celebrated made me feel as if I were a shrivelled old man. (Laughter.) However, I was quite aware that the proposal proceeded entirely from a feeling of kindness—from the same kind feeling I have so often experienced before from the members of the Forfar Bar and their brethren in the adjoining towns. (Applause.) I have had much pleasure, indeed, and great satisfaction, in filling the office of Dean of Faculty for so long a period. I do not mean to say that I have been worthy of it altogether, although I have done my best certainly to forward your interests both in the matter of the Court Houses and in the matter of the Library, to which the Chairman has alluded. (Applause.) But it is impossible for me to say more than that I feel deeply indebted to you for the kindness you have done me. (Applause.) It is quite true that fifty years ago on this very day I was admitted a Procurator in the Forfar Court. Fifty years of work in that Court, or in any other Court I daresay, you will all admit must have involved a very considerable amount of labour, and I have had my own share of that I am quite ready to confess—(applause)—and if I have done it with the acceptance of my brethren in the profession, and to the satisfaction of the public, it certainly affords me the highest pleasure. (Applause.) At that period, fifty years ago, Sheriff L'Amy was the chief of the Court : and he gave way in due time—twenty years after I had been at his Bar—to Sheriff Heriot. At that time Mr. Andrew Robertson was Sheriff-Substitute, and I may mention that then there was no other Sheriff-Substitute in the county. The Court in Dundee had not then been instituted. The Government would not then afford a separate salary for a Substitute at Dundee ; and consequently Sheriff Robertson had the whole duties of the county to do. There was then a very considerable amount of work to do, for Dundee, which has now become a sort of metropolitan town, could almost have employed a Sheriff itself ; and after some years a Sheriff-Substitute had to be appointed at Dundee. Still he had a very considerable business in the Forfar Court ; and just at the time I commenced practice, and very shortly before—in the year 1824—there were large alterations made in the forms of process, and we were all very much puzzled, and a great deal of litigation occurred as to the proper mode of administering these important changes. To these, however, we got tolerably well adapted ; but in 1838 other material changes were made, which necessitated us again

learning the new forms. Then we practised them until 1853, when more alterations in the law were made, to which we had to adapt ourselves, and which continued until 1865, when still larger changes were made. I am not going to dispute that these changes were in many respects improvements—I hope they were—(hear, hear)—but they made a very large addition to the labours of the Procurators at the time, for after we had learned one system, we had very speedily to adapt ourselves to another. We are all getting into the changes as best we can; but we need not yet look for the end of these alterations. (Applause.) While practising before the whole of these judges, and while practising before my courteous friend Sheriff Robertson, I have always experienced the utmost courtesy from the Bench, and I have also received like treatment from my brethren the members of the Bar. (Applause.) The pages of the almanac that contains the *personnel* of the County Courts in Forfar are printed yet in the same form they were in the year 1828, but all the names, except perhaps my own, are changed. I have a very kind and warm remembrance of many of my friends in the year 1828—Messrs. Wyllie, Meffan, and many others—but they have all been called away before me, and I am left here the only practising practitioner in the Sheriff Court of Forfarshire of fifty years standing—in the eastern part of the county at least—(applause)—although I believe my friend Mr. Boyd Baxter, Dundee, is about the same standing. I can only be thankful to Providence for the great health and strength that has been bestowed upon me for the purpose of enabling me to pursue my profession in the past, and I hope still to turn them to good purpose. I know I am indebted for this high compliment to the great friendship of my friends in Forfar and conterminous towns. I was always on the best of terms with my former colleagues at the Bar—(applause)—and I am glad to say that with their successors I stand on the same footing. (Applause.) At the time the roll was made up in the year 1865 the oldest member on it was a Brechin gentleman, my old friend Mr. Speid. He was admitted in the year 1803, and he was alive, but not practising, in 1865, and only died two or three years ago. That, I think, shows there is something very salubrious in the Brechin air. (Laughter.) I was always happy to imitate my friend Mr. Speid—who had as heavy labour as I have had during his professional career—and in respect of longevity, I am like to be his successor. (Applause.) I again repeat that I know of no cause why you should have paid me this great compliment except my accidental longevity, for I am sure that any other gentleman who had been placed in the same position as myself—whether as Dean or in any other capacity—would have received the like generous treatment at your hands. I make no pretensions to higher deservings than my neighbours around me. I am quite satisfied that I have not deserved such an eminent compliment as you have now paid me; and I attribute it entirely to your great friendship and kindness toward me. (Applause.) I have been very much gratified at hearing our excellent friend the Chairman pass such a eulogy upon me; and I return you all my warmest thanks for the great honour you have done me.” (Loud applause.)

The Majesty of the Law.—It would seem that in the sister kingdom much more attention is paid to the “pomp and circumstance” of judicial life than in Scotland, where now and then a judge does not think it derogatory to the dignity of his office to go upon the bench in a “blue cloth pea-jacket” and a billy-cock hat. The *Sheffield Daily Telegraph* states that the other day, “after the High-Sheriff of Derbyshire had met the Judges of Assize, Mr. Justice Hawkins and Mr. Justice Fry, at the railway station, and conducted them to their lodgings, Mr. Justice Hawkins made a communication to the High-Sheriff (through the Under-Sheriff)

to the effect that he (Mr. Justice Hawkins) insisted upon the High-Sheriff appearing in Court in uniform or other official costume. It was explained to his Lordship that the High-Sheriff was not a Deputy-Lieutenant of the county, and was not entitled to wear any uniform, and, moreover, that it was not the custom in Derbyshire for the High-Sheriff for the time being to appear in uniform; that it was the exception, and plain clothes were invariably worn, notwithstanding frequent remonstrances on the part of the Judges of Assize. Mr. Justice Hawkins declined to allow the matter to rest there, or to forego his request that the Sheriff should appear in uniform or court dress, and intimated his intention to inflict a fine of £500 upon the Sheriff unless this request was complied with the next day, and that in the meantime he could not officially recognise the High-Sheriff in any way. The latter felt that there was no alternative but to comply with the request of the Judge, which amounted to an absolute order, and, after repeating his protest through the Under-Sheriff, he appeared on the Wednesday and the successive days of the Assizes in the uniform of a captain in the Derbyshire Volunteers."

Commenting on this, the *Solicitors' Journal* thinks that "as the matter is related in the local paper, the action of the learned Judge does not savour of the dignity and tact which so well become the Bench. But it is to be remembered that in these cases the Judge's version of the story is seldom heard unless a question is asked in the House of Commons; and it is beyond doubt that there is a tendency to decreased stateliness of ceremonial in the reception of the Judges of Assize. Two years ago, one of the most experienced, and perhaps, also, one of the least *difficile*, of the Judges remarked on this in addressing the grand jury at Northampton, and expressed a doubt whether the allegiance of the people to the law could be preserved undiminished if the circumstances of solemnity and state hitherto attending the administration of justice should disappear. We are inclined to some extent to agree with the learned Judge. It would be difficult for the popular mind to grasp the idea of the majesty of the law as personified, for instance, in the American Court, which, according to the description of a recent writer, consisted of 'an elderly gentleman, sitting on a cane-bottomed chair, facing the wrong way, resting his chin on the back of the chair, and expectorating thoughtfully.'"

We are not sure, however, if the American Judge's position was not indicative of as much, if not greater, attention to the case before him than if he sat buried in the recesses of an arm-chair, with wig and cravat awry, a gown half off his back, his hands buried deep in his breeches pockets, and his whole countenance expressive of weariness and disgust. We think the latter position the more undignified of the two. *Verb. sap.*

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF PERTH.

ALEXANDER SEATON v. WILLIAM CHALMERS.

Reparation—Master and Servant.—The facts in this case are all enumerated in the interlocutors of Court.

"*Perth, 11th May 1878.*—Having heard parties' procurators and made avizandum with the process, proofs, and debate, Finds, as matters of fact, first, that the pursuer, whilst in the service of the defender as foreman on the defender's farm, on the 17th day of October last, 1877, in the management or control of a manual reaping-machine then in motion, fell on the knives thereof, and did suffer severe injuries, whereby he is maimed, or permanently disabled in his right hand to a considerable extent: Finds that there is no proof of *culpa* on the part of the defender, his master, whereby he can be made in law liable in reparation for the effects of the injury sustained: Therefore assoilzies the defender from the conclusions of the action, finds him entitled to expenses, remits the account thereof to the auditor to tax and decern.

"HUGH BARCLAY.

"*Note.*—The pursuer has received a very severe injury, which will deprive him to a great extent of the complete use of his right hand, though certainly the amount claimed (£500) is most extravagant. He is an object of great sympathy; but this all the more renders it necessary that the case be decided not on feeling, but on strict legal principles. Agricultural servants are of necessity exposed, like their masters, to risks which are incident to their calling. A kick from a horse, or a butt from a bull or ox, a fall from a cart or stack, or a cut from a scythe or sickle, or a wound from the prongs of a grape, have often proved fatal, but the master is not to be held liable for the consequences of such perils where sustained by his servants. A reaping-machine is peculiarly attended with danger, and requires great care on the part of the sheaver when standing behind cutting instruments in motion.

"The pursuer's case is founded on the averment and plea that the defender insisted on his working the machine with one of his feet attached to or surrounded by a rope, instead of a leather strap or belt, to a part of the machine. In consequence of this he maintains that he was unable to get his foot free from the loop when a portion of the machine broke, and so was dragged forward on the knives. Now, first, there is no evidence of this averment, on the contrary, the evidence is that his foot was free from the ligature at the time of the accident; second, next, though there is conflicting evidence, it is not at all clear that a leather strap or belt would have prevented the casualty; and third, though the first and second points had been established in favour of the pursuer, there is not such evidence as would fix *culpa* on the defender so as to render him liable in reparation for what must be held to be an unfortunate accident.

H. B."

On an appeal the Sheriff pronounced this interlocutor:—

"*Edinburgh, 19th June 1878.*—The Sheriff having considered the debate and whole cause, Finds it not proved that the injuries suffered by the pursuer were caused by the fault of the defender in not having a machine in good repair at the time, and with this finding affirms the interlocutor of the Sheriff-Substitute, dismisses the appeal, and decerns.

ROBERT LEE.

"*Note.*—This is a hard case, and the Sheriff thinks that the law which governs it is a somewhat hard law, but he is unable to distinguish it in principle from the class of cases of which *Orrichton v. Reid & Orrichton* (Feb. 14, 1863, 1 Macp. 407) is an example. In that case a servant employed in the

construction of a railway embankment suffered injury through a waggon going over him, which he was engaged in driving to the point where it was to tilt its contents over the 'tip.' He alleged that the horse furnished to him by his employers was unfit from age, and otherwise, for the work which he had to do, and that his employers were aware of the unfitness, and had promised him another, but had induced him to go on with the old horse in the meantime, the consequence being that in endeavouring to do his work the pursuer was knocked down and run over. It was held that the pursuer's averment showed that he knew the unfitness of the horse and the danger of working with it, and that he had no claim. 'If a servant,' said the Lord Justice-Clerk, 'in the face of a manifest danger, choose to go on with his work, he does so at his own risk, and not at the risk of his master. The averments of the pursuer as to the condition of the horse are, I think, such as, if true, would entitle him to refuse to continue working, and I cannot in such circumstances allow a servant to say to his master, "I went on at your risk."' He held it to be a plain case of manifest danger equally well known to the master and to the servant. In the present case one of the risks attending the employment which the pursuer undertook was that of working a reaping-machine over rough ground from a very insecure seat, and with his foot in a sort of stirrup connected with the tilting-board. He alleges that the stirrup was out of order; that the tilting-board had previously broken with him; that it was dangerous to proceed without a belt; that on the occasion in question he told the defender he would not sheaf any more unless the defender would get him a belt; that the defender promised to get a belt, but urged the pursuer in the meantime to go on with the rope as the work could not be stopped, and that he went on relying on the defender's promise and at his request. In about an hour's time the tilting-board again gave way, and the pursuer somehow fell forward and got his hand in front of the knives. The Sheriff is disposed to think that the evidence supports to a large extent the pursuer's allegations, though he agrees with the Sheriff-Substitute in thinking it not made out that the accident was caused by the want of a leather belt, or the use of a rope in place of a belt. He is of opinion, however, that the facts, even as averred by the pursuer, do not infer liability on the part of the defender. The pursuer had it in his power to refuse to go on with his work if the machine was not in a fit state of repair. He was clearly aware of the condition of the machine, and must be held to have undertaken the risk of going on. Unfortunate as the result has been, the law gives no redress to the pursuer against his employer. R. L."

Act.—Mitchell.—Alt.—M'Steewart.

SHERIFF COURT OF STIRLING AND DUMBARTON AT STIRLING.

Sheriff GLOAG and Sheriff-Substitute BUNTINE.

MILLAT v. MARSHALL—22nd May and 4th July 1878.

Competency of action in Sheriff Court for warrant to give possession of house let under verbal lease.—The facts of the case appear from the notes to the Sheriff-Substitute and Sheriff's interlocutors:—

"Stirling, 22nd May 1878.—Having heard parties' procurators on the closed record and made avizandum, for the reasons stated in the subjoined note, *Sustains* the second preliminary plea of the defender, assoilzies him from the conclusions of the actions, finds him entitled to expenses, *allows* an account thereof to be given in, and remits the same when lodged to the auditor of Court to tax and report, and decerns.

J. R. BUNTINE.

"Note.—In this petition it is alleged that the defender entered into a contract of lease with the petitioner, whereby he undertook to give him possession at the term of Whitsunday last of a room in Murray Place for one year at the rent of £3, 10s.

"The defender now refuses to give possession, and the petitioner craves that the defender should be ordained to give instant possession, failing which, warrant should be granted to officers of Court to break open said room and put the petitioner into possession thereof.

"The Sheriff-Substitute can find no authority for granting such a warrant, except that Mr. Soutar in his 'Books of Styles of Sheriff Court Writs' gives a form of petition similar to the present, p. 149. There is a note at the end, however, to the effect, 'Perhaps the pursuer's claim may make properly, and effectually resolve into one of damages.'

"Where a contract of lease has been broken by the lessor refusing possession, the remedy of the lessee is an action of damages, just as where the lessee breaks the same contract by refusing to take possession, the only remedy competent to lessor is a similar action.

"The lessee could not be competently ordained to implement his bargain by furnishing and inhabiting the house, nor can the lessor be ordained to give possession under his contract. (Guthrie's edition of 'Hunter on Landlord and Tenant,' vol. ii. pp. 534, 541.) It might be that the defender here had let the room to another tenant, who is in possession, or it might be that his own lease being at an end, the landlord and owner had resumed possession. It might be that he had no right in this room which could be conveyed to another, no power to grant a lease.

"In each one of these cases the petitioner, if he is able to establish his contract by proof, would be entitled to recover damages for breach of it; but it is thought that the Sheriff-Substitute has no power to enforce implement.

"J. R. B."

The pursuer appealed to the Sheriff, who pronounced the following interlocutor:—

"*Edinburgh, 4th July 1878.*—The Sheriff, having resumed consideration of the cause, Recalls the interlocutor of the Sheriff-Substitute, dated 22nd May, *repels* the second preliminary plea in law for the defender, and *remits* the cause to the Sheriff-Substitute for further procedure. Reserving all questions of expenses.

W. E. GLOAG.

"*Note.*—The Sheriff has given the question raised by this appeal his very careful consideration, but he has been unable to adopt the grounds in law of the Sheriff-Substitute's judgment. The petition is founded on an allegation of a verbal bargain for a sub-lease of a room, in a tenement of which the defender is tenant, and prays for an order on the defender to give the pursuer possession, and, in the event of the defender failing to comply with that order, for a warrant to officers of Court to break open the doors of the room and put the pursuer in possession. The defender denies that there was any completed bargain, but does not dispute his power as sub-tenant to enter into it. He does not assert that his landlord has any interest. The question whether there was a lease or not will fall to be determined, and it was not, and it is thought could not have been, disputed that the Sheriff has jurisdiction to determine that question for the purposes of this action. (See *Robertson v. Cockburn*, 22nd October 1872, 3 *Rettie* 21.) But it has been pleaded for the defender that this action for specific implement is incompetent, and that the pursuer's right resolves into a claim of damages, and that plea has been sustained by the Sheriff-Substitute, who was of opinion that he could not enforce specific implement, and he has assuaged the defender from the whole conclusions of the action. The interlocutor proceeds, of course, on the assumption that the pursuer may be right on the merits, and amounts to the proposition that supposing it to be true that the defender agreed to put the pursuer in possession, he can neither be ordained nor compelled to fulfil that agreement. Now, supposing the petitioner's averments to be true, his right unquestionably is to get possession. It is out of that right that his claim of damages for breach of contract arises, but, on demanding possession, he is asking no more than he is entitled to, and, that being so, it appears *prima facie* to be the duty of the

Court to give him what aid it can, and so far as it is able, to compel fulfilment of the defender's obligation. It falls on the defender to show by reason or authority why the Court cannot, or ought not, to do so. No authority was referred to by the defender in support of his plea, and the passages in 'Hunter's Landlord and Tenant,' vol. ii. pp. 534, 541, to which the Sheriff-Substitute has referred, do not appear to the Sheriff to support it. It is there said that damages are due if a tenant does not take possession, or inverts possession; and also if a tenant does not receive or is deprived of possession; and that is, no doubt, true, but it by no means follows that a right to receive damages is the only right arising in such cases. Wherever there is breach of contract, there may be a claim of damages, but, in many cases, and (as the Sheriff thinks) as a general rule, the party desiring fulfilment of a contract is entitled to call upon the Court to enforce it, and to compel the other contracting party to do the precise thing which he has bound himself to do. No doubt there are many cases in which specific implement will not be enforced, and there may be some, and there is at least one, in which it will not be ordered. Fulfilment of the obligation involved in a promise of marriage will not be ordered by the Court although damages will be given for failure to fulfil it, and there are various contracts of which, from their nature, specific implement cannot be compelled. But the Sheriff must regard such cases as exceptional, and very frequently the reason why implement is not compelled, is simply because the Court has not the means of compelling it, and the Sheriff is not aware of any class of cases in which the Court has the means of directly enforcing implement of contract and refuses to do so. The Sheriff-Substitute refers, by way of illustration, to the somewhat parallel case of a tenant of a house refusing to inhabit or furnish it. But in such a case a petition to have the tenant ordained to furnish his house would not be held incompetent, nor would the defender be assoilzied; on the contrary, he would be ordained to furnish the house; and petitions for the purpose of compelling a tenant to plenish are frequent. How the order of the Court could or would be enforced is a different question. But it would be pronounced. Probably the landlord would find that practically he had no other, or, at least, no better remedy than an action for irritancy of the lease, and a claim for such damages as he might establish; although the Sheriff is not aware that it has ever been expressly determined that the *compulsitor* of imprisonment would in every case be refused. (*M'Dougal v. Buchanan*, 11th Dec. 1867, 6 Macp. 120; *Whitelaw v. Fulton*, 1st Nov. 1871, 10 Macp. 27.) The analogy of such cases, therefore, does not seem to warrant the dismissal of this petition. It would rather warrant an order on the defender to give possession, leaving it to the pursuer to find out how the order could be enforced. But the case supposed appears to differ from the present case in this important particular—that the Court does not appear to possess the means or power of directly compelling implement of a tenant's obligation to furnish his house. Here the Sheriff thinks that the Court has power to compel implement. In the case of *Seaforth's Trustees*, 7th December 1844, 7 D. 180, the pursuer concluded for implement of missives of lease, and for decree ordaining the defenders to give him possession of the lands in question, and alternatively for damages, and he used inhibition on the dependence. The defenders offered to consign the full sum claimed as damages, and they asked recall of the inhibition. But the Court refused to recall the inhibition, expressly on the ground that the pursuer was not bound to be satisfied with damages, but was entitled to insist for implement. This case, which was quoted in the argument before the Sheriff-Substitute, but not in the argument before the Sheriff, appears to be an authority directly negating the proposition that the pursuer's sole right in this case is a claim for damages. This case is referred to by Mr. Hunter (vol. ii. pp. 179, 180) in support of the proposition that a tenant is, in such a case, entitled to insist for implement, if he prefers implement to the alternative of damages. In 'Bell on Leases' also it is distinctly laid down that the 'lessor is liable to a direct action at the instance of the lessee against the lessor for attaining possession.' (Bell

on Leases, vol. i. 318, ii. 127.) The Sheriff must, therefore, conclude that there is sufficient authority for the pursuer's first conclusion in this case for an order on the defender to give the pursuer possession, and the Court must, it is thought, pronounce an order to that effect, if, but of course only if, the pursuer shall make out his case on the merits, and the defender shall fail to make good his defences. The only question remaining is, whether the Court can give a warrant in terms of the concluding part of the prayer. Perhaps it is unnecessary to decide that point at present, and presumably such a warrant will not be necessary. The defender may succeed in showing that he has a perfectly good defence, or if not he may, and it is to be supposed will, obey the order of the Court and give possession. But as the Court will only reluctantly pronounce an order which it cannot enforce, it is probably right that the Sheriff should add that he considers it to be in the power of the Court to grant and put in execution the warrant for which the petitioner prays. The Court has jurisdiction to deal with the question between the parties, and must be held to have every power, without which its jurisdiction cannot be explicated. (Ersk. I. 2, 8.) It has right at Common Law to issue Letters of Open Doors in aid of the diligence of poinding (*Scott v. Letters*, 27th June 1844; 6 D. 1221, affd. 10th April 1848; 5 Bell's Appeals, 126); and the Sheriff can hardly doubt that if a warrant were granted to recover an abstracted deed, he could, if necessary, authorize the opening of any lockfast place in which it might be retained. In the case of *Dobbie v. Halbert*, 7th March 1863, 1 Macp. 532, where the defender had unlawfully put a lock on a pew in a church, the pursuer petitioned the Court for an order on the defender to remove the lock, and failing the defender doing so, for a warrant to the officers of Court to remove it. The Sheriff granted the prayer of the petition, and his judgment was affirmed on advocacy. It seems equally competent to remove or break open the lock of the door in this case, and the Sheriff, as at present advised, considers that the Court could competently do so. The Sheriff-Substitute suggests various difficulties which might arise if the interests of third parties were affected, and in such cases there might be such difficulties as the Sheriff-Substitute points out, and it might be necessary that the pursuer should direct his action against such parties, and he might in conceivable cases find extreme difficulty in working out his remedy, for he might not be entitled to pursue a removing against a third party in possession. But these difficulties appear to arise from the specialties suggested, and not to attach to the general question apart from such specialties, and it is thought, therefore, that in dealing with this case where they do not occur it is unnecessary to resolve them. The second preliminary plea for the defender is the only one which can be disposed of at this stage, and the Sheriff has thought himself in a position to repel it. None of the other pleas are preliminary, but depend on the merits of the case. Probably they cannot be decided without proof, and although it is a great pity that the parties should go to the expense of a proof in regard to a matter which must be of very little consequence, still the plea with which the present interlocutor has dealt is not without general application and importance, and might in other cases involve questions of greater importance. W. E. G."

Act.—Logie.—Alt.—A. & J. Jenkins.

SHERIFF COURT OF ABERDEEN.

Sheriff-Substitute WILSON.

KING v. REID.—10th July 1878.

Master and servant case.—Decision was given in a small debt action, which was raised at the instance of George King, farm servant, against Mr. George Reid of Clinterty, Blackburn, for £1, 16s., as the balance of the wages due to

him as a servant at Whitsunday last. The claim was resisted on the ground that the defender was entitled to dismiss the pursuer from his service for the period for which the wages are claimed, seeing that his family were laid up with gastric fever.

Sheriff Wilson said: "This is an action for wages which raises a question of a novel description. The pursuer was a farm servant to the defender, and it appears that in the course of his service, one of his daughters took ill of gastric fever. He was thereupon required by the defender to abstain from work in case the infection should spread amongst the other servants, and he did so. He was then off work for a period of eight weeks, and the question arises, whether he is entitled to get his wages for that time. There is also a subordinate question raised about wages for a period of three weeks, during which the pursuer himself was in bad health. But I do not think that there is any ground for argument in regard to that point. He was ill only for three weeks out of a period of six months, and although the law says that there is to be a deduction on the ground of ill-health when a disproportionate long period of the service is passed in ill-health or unfitness for work, yet it is decided that when it is a comparatively short period, the master is bound to take his chance, and I don't think that three weeks is too long. That point raises no difficulty in my mind, but it is entirely different from the question of the eight weeks during which he was off work on account of the bad health of his daughter. Now, it is almost sufficient to dispose of this case against the defender, to say that I know of no precedent for any deduction in a case of this kind. It is a case where inability to work arises not from any inability in the pursuer himself to fulfil his contract, or on account of any fault in him. It arises from a misfortune which, so far as we can see, was an innocent misfortune in so far as it regards the pursuer; therefore, upon the principle that if it was necessary that the pursuer should leave on account of that misfortune, the loss must just fall in equal proportions upon the master and upon the servant; but there is this further difficulty. I am not satisfied with the evidence, and it does not bear out that there was any real necessity for the pursuer having been stopped from his work. It is a very common thing to have illness in one's family, but it would be a very serious matter if the father had always to leave off from his work for fear of the spread of infection. If it had been the case that the pursuer had been asked to take certain precautions to prevent the spread of this disease, and he refused, he would then have been at fault, and that would have been a good ground to dismiss him; but the mere fact of a fear of infection is not a sufficient ground for a farmer to send a servant out of his employment. Everybody is bound to take the risks of infection; we cannot always keep perfectly clear of disease in the course of our life. I daresay in the public works of this town there are people working in whose families illness is present, but it would be a most serious matter were the masters entitled to dismiss all these persons, and to have nothing further to say to them. But there is another consideration. We can suppose the case of a master being taken ill of fever, or any member of his family. It is not to follow that all the servants are entitled to leave him unless there is some much more serious danger than anything made out in this case in spreading infection. I do not think the servants are entitled to end their work with the master, or that he is entitled to ask them to leave. Of course, if he chooses to preserve perfect immunity from all risk of infection, he is entitled to have it; but he is bound to pay for it. Seeing that this misfortune was through no fault of the servant, and seeing that he was willing to fulfil his contract, and that his leaving off work was not an absolute necessity, I think in this particular case the servant is entitled to have his wages; and I therefore give him decree for the sum sued for, with expenses."

Act.—Stewart.—Alt.—Prosser.

COMMISSIONERS OF OLD ABERDEEN v. ANDERSON AND MACKIE.

10th July 1878.—Decision was given by Sheriff Dove Wilson, in the Aberdeen Sheriff Court, in the action at the instance of Mr. Stables, clerk to the Commissioners of Old Aberdeen, against Messrs. Alexander Anderson, farmer, and James Mackie, cattle-dealer, for payment of their water-rates.

Sheriff Wilson, in giving decision in Anderson's case, said: "This was a question as to the liability of the defender for certain water-rates in the Old Town of Aberdeen. In terms of a former decision I held that in the absence of anything to say to the contrary, the defender here, and others in his position, must be held to have acquiesced in the terms of the notice with respect to the amounts payable, which was given by the Commissioners for the Old Town. The special points raised in this case are three in number. In the first place there is a point raised as to whether a farm is to be held as a trade within the meaning of the 225th section of the General Police Act; in the next place there is a question as to whether certain horses kept by the defender are to be considered as having been kept for hiring; and in the third place there is a point about whether defender was rightly charged for water-rates upon them. With regard to the first point, it does not seem to me to arise properly in this case, and I reserve my opinion upon whether a farm can be properly described as a trade, manufacture, or business within the meaning of section 225. In the present case the pursuers have elected to charge the defender upon the footing of his keeping horses for hire and cattle especially. If they choose in any case, in place of charging in that way, to charge persons in the position of defender upon the ground of their keeping a farm, then I will be ready to decide the point; but it does seem to me that it would not be fair to try and charge on two grounds—first, for carrying on a trade, and then to charge him separately and additionally for the things necessary to carry on that trade. With regard to the second point, the defender is charged for four horses, and he concedes liability for two. It was said that the other two were to be considered as being kept for hire, because the defender was in the way of driving sand for customers with them. The facts are these—The defender sells sand from a gravel pit which he has; he sells it at a certain price when delivered at the pit, and charges so much more when it is delivered at the residences of the buyers. It appears to me that it was rightly argued that the defender does not keep these horses for hire, and that he cannot be put into the position of a hirer. The contract that arises out of these facts as between him and the buyers of the sand is not a contract of let and hire, it is simply a contract of sale, and just puts him in the position of a seller who charges so much more for so much more work. With regard to the third point—liability for the cattle—it appears that the defender has a court connected with the place where his horses and cattle are kept, and that in that court he has the water introduced, and has it supplied to a tub or trough that stands there. It is contended for him that the cattle he has, although passing that place occasionally—every now and then, and although kept in the immediate vicinity, and although they have no other water supply—yet they are such total abstainers from water that in the whole course of the year they never take any water from the trough. That may be the case. I do not mean to dispute that the defender honestly believes that the cattle never touch that water. But I rather doubt he is mistaken, and that at times they occasionally drink from it. I do not think the pursuers are bound to inquire so much as it was contended for into this matter. It is enough to make the defender liable that the water is introduced for the use of the cattle and is ready to be used by the cattle when required. It may be the case that in this case as well as in some others the cattle take very little water, and that the charge is too high a rate. A charge of 2s. 6d. a head for cattle that consume an infinitesimal quantity is evidently too much, and I shall be quite prepared to revise the rate of charge for water supplied in that way if applied to. But in this case the point is settled by the defender not having objected to the charges given notice of, and I must

sustain that notice of rate in future cases to be the charge, although I shall be very glad to modify it on a proper application. The number of cattle is stated as ten: it seems he keeps only nine. The decree will be for two horses at the rate charged, and for nine cattle, and for expenses. In Mackie's case the point is similar, and I am disposed to settle it also on the same grounds. It seems here that the defender in regard to the horses is charged for two, whereas he keeps only one, and that is not kept for hire. The point has also been raised that he is a horse-dealer. He may be a horse-dealer, but he does not deal in them within the Old Town of Aberdeen. With regard to the cattle the same rule holds. He has no other water supply than that of the Police Commissioners, and decree will be passed in this, as in the other case, for the rate charged for the cattle.

Act.—Peterkin.—Alt.—Prosser.

TODD v. HAY.—25th July 1878.

Private prosecutor—Wild Fowl Preservation Act.—A complaint was brought at the instance of Mr. Gavin Thomas Todd, manufacturer, Aberdeen, against James Hay, miller, at Midmill, Kintore, charging him with having fired at and shot, or attempted to shoot, a wild duck within the close time.

Mr. A. E. Smith appeared for the accused, and took exception to the title of Mr. Todd to sue, upon the ground that the Act did not specially authorize prosecutions at the instance of common informers, that Mr. Todd set forth no title except that of a common informer, that at common law a private person could not prosecute such an action, and that, when a statute imposing penalties did not make special provision for the recovery of these penalties, the action could only be at the instance of the Procurator-Fiscal.

Mr. Stewart, who appeared for the complainer, offered to amend the instance to the effect of stating that Mr. Todd was lessee of the shootings where the offence alleged was said to have been committed, and this amendment was allowed.

Mr. Smith thereupon repeated his objection, and said that this amendment did not obviate it, in respect that the Wild Fowl Preservation Act did not bear to have any connection whatever with the game laws, that it was passed for a special and specific purpose therein narrated, and had no reference to game. He argued that Mr. Todd's title to sue was in no better position—that the fowl fired at was a wild duck—than he would have been supposing the bird libelled had been any other bird enumerated in the Act, the name of which does not appear in the game list.

The Sheriff took the case to avizandum, and afterwards issued the following interlocutor: "This case is a prosecution under the Wild Fowls' Act, which was brought two days ago, when the objection was taken that the instance of the complainer was not sufficient. The complainer is a private person, who simply gives his designation, and the objection was taken that under this Act it was not competent for any informer to proceed, and that if a private person did proceed, he must at all events show a sufficient interest to entitle him to conduct the prosecution. I had an impression at the time that the matter was settled by authority, but the authorities were not at hand, and I took time to consider the matter. I find that the point is settled by authority. Under a prosecution which took place under the Poisoned Grain Prohibition Act exactly the same point arose, and there two points were in terms decided. It was held that a complaint under the Poisoned Grain Prohibition Act did not contain a proper criminal charge, and might be prosecuted at the instance of a common informer, and that it was unnecessary for the common informer to set forth any interest such as injury suffered. That was the case of Hamilton against Girvan, which was decided by the High Court of Justiciary in June 1867; and on comparing the Poisoned Grain Prohi-

bition Act with the present Act, the Act for the Preservation of Wild Fowls, it will be seen that the penalties are exactly of the same nature, and are to be prosecuted for in the same way. That case, therefore, is decisive of the competency of prosecuting an action like this at the instance of a common informer. In respect to the necessity of setting forth any interest by the common informer, I shall only add this, that I don't see how it is well possible that any sufficient interest could be possessed by one member of the public more than what is possessed by all the members. The Act is not one for the protection of private interests in any way. It is an Act which was passed by the Legislature with the view of preventing the destruction of certain of the smaller of our wild fowls, which were thought to be beneficial to the country, or, at all events, to be harmless, and which it was thought it would be a pity to all to be exterminated in the course of their breeding season. Now, that is an Act in which no partial individual can have any particular interest to carry out more than any other. In the present case it appears that the person who sues as a common informer has a certain interest in the matter, namely, that he is a tenant of the shootings upon which it is alleged that the wild fowl were interfered with on the present occasion. That, as a matter of fact, sufficiently explains why he takes an interest in the matter, and leads him to prosecute, but it does not appear to me that it gives him in point of law any kind of interest in the matter beyond that which others have, because the question not being one of preservation of game but of preservation of wild fowls for the public interest, it does not seem to me to give a man any better interest in preserving them at one time of the year than he intends to destroy them at another time of the year. The result of holding that it was necessary to set forth a specific interest would be that no person could have a specific interest, and that no complaint could be raised but at the instance of the public prosecutor. Now, I should not be sorry for my own part that all such complaints were raised at the instance of the public prosecutor. I think it would be a great advantage; but then the Government and the country have not seen fit to make arrangements by which the public prosecutors are enabled to take them up, and therefore one cannot have that course. I think it would be a great advantage if it could. The hearing of these complaints to be taken up by private parties has the effect of attaching to the exercise of the law, in cases like this, two of its worst faults. It makes the law capricious in its application, and makes it unnecessarily severe when it is applied. The law is capricious in its application, because in most cases nobody takes sufficient interest to run the risk of a prosecution in a case like this, and the Act lies a dead letter. And then when it is taken up by a private party, when our criminal laws lie in the state of chaos that they are in, a private party should have an agent, and that increases the expense of the matter to a considerable extent, and very frequently makes the expenses to be awarded in a very trivial matter much beyond those which ought to attach to the offence. But, in the present state of the law, I see no means of effecting this, as the public prosecutor is not authorized to prosecute these things. In the eyes of the law, I must hold that the present complainer has a perfectly sufficient interest to complain, and, therefore, I repel the objections, and call upon the defender to state whether he is guilty or not guilty.

Mr Smith—It is a plea of not guilty.

Mr. Stewart was not prepared to lead evidence at that diet, and the case was adjourned.

Act.—Stewart.—Alt.—Smith.

Notes of English, American, and Colonial Cases.

INTOXICATING LIQUORS.—*License to sell beer, etc., for consumption off the premises—Refusal by justices.*—Where justices refuse a license to an applicant under the Wine and Beerhouse Act, 1869, for the sale by retail of beer, etc., not to be consumed on the premises, they are bound to state at the time the ground upon which they have so refused it.—*R. v. The Justices of the Chertsey Division of Surrey*, 47 L. J. Rep. M. C. 104.

INTOXICATING LIQUORS.—*Wine and spirit merchant—Retailing spirits without excise license—Orders taken at one place and executed at another.*—The appellants carried on business as wine and spirit merchants in W., and held all the licenses the law required, for dealing in and retailing spirits there; the appellants did not hold a license to retail spirits at C., but they rented certain premises there, which were occupied by a traveller on their behalf. On these premises were stored beer only, belonging to the appellants (for the sale of which they took out a license), but the traveller took orders for spirits there, which appellants executed by sending the spirits as required from W. The appellants were convicted by justices of retailing spirits in C. without having a retailer's excise license, contrary to the provisions of 6 Geo. IV. c. 81:—*Held*, that the conviction was right, on the ground that the appellants carried on business at C. as retailers of spirits, notwithstanding that no spirits were kept there, but were delivered from another town, where the appellants carried on the business of wine and spirit merchants.—*Stallard & Sons v. Marks*, 47 L. J. Rep. M. C. 91.

SALE OF FOOD AND DRUGS ACT.—*Conditions precedent to summary conviction—Analysis by public analyst—Notification by purchaser to seller.*—It is a condition precedent to a summary conviction under the Sale of Food and Drugs Act, 1875, that the purchaser of the article shall notify to the seller his intention to have it analyzed by the public analyst. It is not enough for him to say that he had purchased the article for the purpose of analysis.—*Barnes v. Chipp*, 47 L. J. Rep. M. C. 85.

BILL OF EXCHANGE.—*Insolvency of acceptor—Liquidation in Australia—Holder in England—Re-exchange.*—Re-exchange is the measure of damage sustained by the holder of a dishonoured bill of exchange drawn in one country on a person in another country, and is payable in addition to the amount of the bill.—*Willans v. Ayers*, 47 L. J. Rep. P. C. 1. L. & Co. carried on business both in London and in Australia. The firm in London drew bills on the firm in Australia, and delivered them to creditors of the firm in London. L. & Co. became insolvent under a deed providing for liquidation in Australia:—*Held*, that such creditors were not, under the circumstances, entitled to prove in respect of "re-exchange."—*Ibid*.

SHIP AND SHIPPING.—*Bill of lading—Charter-party—Consignee prevented discharging cargo within the time by default of other consignees—Demurrage.*—The defendants in two actions, who were indorsees of bills of lading for portions of cargoes of wheat, were sued by the respective shipowners for demurrage. In the first action, the bill of lading contained the following stipulation: "Three working days to discharge the whole cargo, or £30 sterling per day demurrage." In the second action the charter-party under which the ship was chartered stipulated that fourteen working days were to be allowed for loading and unloading at the port of discharge, and ten days' demurrage at £35 day by day, and the bill of lading said, "Paying freight for the same goods and all other conditions as per charter-party." In both cases the defendants' portions of the cargoes were stowed at the bottom of the hold, and in consequence of the consignees of the upper portions not being ready to take delivery as soon as the

ship was ready to discharge, they were unable to clear their portions till after the expiration of the lay days:—*Held*, in both cases, that defendants were liable, on the ground that the stipulation in the bill of lading in the first case, and that in the charter-party (which was to be read into the bill of lading) in the second case, amounted to an absolute contract to pay demurrage if defendants failed to discharge the cargo within the time, unless prevented doing so by the default of the shipowner.—*Straker v. Kidd & Co.*; *Porteous v. Watney*, 47 L. J. Rep. Q. B. 365.

BILL OF LADING.—*Goods shipped on account of vendee—To vendor's order or assigns—Passing of property.*—Plaintiff contracted to purchase a certain quantity of goods from P. & Co. P. & Co. purchased the goods from C., whom they paid, and shipped them from Cyprus to London for and on account of defendants, and delivered the invoice to plaintiff. They drew a bill on plaintiff's firm in London to the order of C. C. discounted it with defendants', and forwarded it to defendants' London agents, together with bills of lading drawn to the order or assigns of P. & Co., with instructions that plaintiff's London firm would be ready to accept and pay it at maturity against delivery of the bills of lading. The bill being presented to plaintiff, he refused to accept it without receiving the bills of lading. Thereupon defendants took possession of the cargo, and, notwithstanding that plaintiff offered to pay the bill of exchange, refused to deliver to him the bill of lading without payment of the bill, together with the freight and charges; and eventually sold the cargo for less than its value. On a special case, the arbitrator found as a matter of fact that the parties had intended that the property should pass to plaintiff on shipment of the goods:—*Held*, that such finding was justified by the facts; that the property had passed to plaintiff, on the tender of payment of the bill of exchange, and that as defendants had no title to the goods, plaintiff could maintain an action against them for the conversion thereof.—*Mirabita v. Imperial Ottoman Bank* (App.), 47 L. J. Rep. Exch. 418.

BILL OF LADING.—*Liability of consignee named in bill of lading—Delivery to be taken within reasonable time—Contract implied by law in bill of lading.*—Where there is no express stipulation in a bill of lading it is an implied term of the contract contained in it, that the consignee named in the bill of lading, or his assigns, will take delivery of the goods within a reasonable time; and the person to whom the property in the goods has passed, by reason of such consignment, is by virtue of the Bills of Lading Act, 1855 (18 & 19 Vict. c. 111, s. 1), subject to the liability so to take them. Where the charterers and the shippers are the same persons, such contract will still be implied in the bill of lading, notwithstanding the existence of an express stipulation in the charter-party, between the charterers and the shipowner, in reference to the same matter.—*Fowler v. Knoop*, 47 L. J. Rep. Q. B. 473.

NEGLIGENCE.—*Wire fencing—Adjoining occupiers of land—Injury to cattle through eating wire.*—Defendants' land was separated from plaintiffs by a fence which had been put up by defendants' predecessors in title, and which was maintained by defendants. This fence was constructed of old wire rope, the strands of which had by long exposure to the weather decayed and separated into pieces; some of these fell on to plaintiff's land, where they lay hidden among the grass. Plaintiff's cow in grazing picked up and swallowed one of these pieces of wire, and in consequence died:—*Held*, that plaintiff was intitled to maintain an action for the loss of the cow.—*Wilson v. Newberry* (41 L. J. Rep. Q. B. 31) distinguished.—*Firth v. The Bowling Green Company*, 47 L. J. Rep. C. P. 358.

ADULTERATION OF SEEDS ACT.—*"Seeds of another kind"—Improving quality of clover seed by sulphur smoking.*—By the Adulteration of Seeds Act, 1869, s. 3, any person who, with intent to defraud, "dyes or causes to be dyed" any seed is rendered liable to certain penalties therein specified. By section 2 the term "to dye seeds" means "to give to seeds by a process of colouring, dyeing,

sulphur smoking, or other artificial means, the appearance of seeds of another kind." Respondents improved the appearance of some old clover seeds by the process of sulphur smoking, and thereby made them resemble young clover seed, with intent to defraud:—*Held*, that they had committed no offence, inasmuch as there had been no adulteration, and the seeds in question were only improved in quality, and not made to resemble seeds of another kind.—*Francis v. Maas*, 47 L. J. Rep. M. C. 83.

LAND TAX.—*Exemption of site of hospital—Removal of hospital.*—An hospital which was erected before the passing of 4 Will. & M. c. 1, imposing a land tax, and the site of which was exempted from that tax by the provisions of 38 Geo. III. c. 5, ss. 25, 29, was by a decree of the Court of Chancery removed to another site, and the old site was discharged from the charitable trusts to which it was then subject:—*Held*, affirming the decision of the Court of Appeal, that the removal of the hospital and secularization of the site did not remove the exemption from land tax conferred on the site as "land belonging to an hospital before the fourth year of William and Mary," by 38 Geo. III. c. 5, s. 29.—*Cox v. Rabbits* (H. L.), 47 L. J. Rep. Q. B. 385.

DOMICILE.—*Animus manendi.*—Testator born in Scotland, emigrated to Queensland, where he bought a station and resided for four years. He afterwards bought land and built a house in New South Wales, where he resided with his wife and family till his death, which occurred suddenly at the station in Queensland, and he was buried there by his own wish:—*Held*, that testator had abandoned his domicile of origin, and had acquired a domicile of choice in New South Wales.—*Platt v. The Attorney-General of New South Wales*, 47 L. J. Rep. P. C. 26.

BILL OF EXCHANGE.—*Acceptance—Acceptance in writing.*—A bill of exchange is not sufficiently accepted to satisfy the 19 & 20 Vict. c. 97, s. 6, which requires the acceptance to "be in writing on such bill and signed by the acceptor," if the person on whom it is drawn merely writes his name across the face of it, and there are no words amounting to a statement that the bill is accepted. [See, however, the 41 Vict. c. 13, s. 1.]—*Hindaugh v. Blakey*, 47 L. J. Rep. C. P. 345.

TRADE MARK.—*Patent.*—Plaintiffs, under patents, made floorcloth of a new substance marked with the word linoleum:—*Held*, that "linoleum" being the only name of the new substance, plaintiffs, at the expiration of the patents, were not entitled to the exclusive use of that word.—*The Linoleum Manufacturing Company v. Nairn*, 47 L. J. Rep. Chanc. 430.

TRADE NAME.—*Of colliery—Injunction.*—Plaintiffs were owners in fee of, and worked all the coal-pits in the parish of Radstock. Defendants were lessees of a colliery, the coal raised from which was of a class known as Radstock coal, and was in the district of Radstock railway station for the purpose of goods traffic. Defendants were restrained from advertising themselves as "The Radstock Colliery Proprietors."—*Braham v. Beauchamp*, 47 L. J. Rep. Chanc. 348.

MINE.—*Action for injury to land from mines of adjoining owner—Damage, when to be estimated—Recovery of prospective damage—Right to support of adjacent land.*—Where injury has been occasioned to land and buildings by mining operations under the land of an adjoining owner, the plaintiff is entitled to recover, in an action founded upon such injury, compensation, not only for the damage that has actually occurred at the time of action brought, but also for the prospective damage resulting from the defendant's act. As the cause of action was complete at the moment that the first damage accrued to him, the plaintiff must recover once for all in one and the same action for all damage, past, present, and future, resulting from that one cause of action—for the reason that no occurrence of damage subsequently, as the result of the original act of the defendant, would give a fresh cause of action.—So held, *per* MILLER, J.,

and MANISTY, J.; COCKBURN, L.C.J., *dissentiente*; and *per* COCKBURN, L.C.J.—There being no abstract right to the support of the adjacent land, the act of the excavating owner is only tortious when it produces and to the extent to which it produces actual damage. On the one hand, therefore, the defendant is not liable for damage which has not occurred, and which never may occur; and on the other, each fresh interference with the enjoyment of property, on the occurrence of subsequent damage, is a wrong done, and creates a further cause of action, of which the plaintiff can avail himself.—*Lamb v. Walker*, 47 L. J. Rep. Q. B. 451.

VENDOR AND PURCHASER.—*Evidence of payment of instalments under composition*.—Where a debtor having filed a petition for liquidation, resolutions accepting a composition are afterwards passed as provided by the Act, the debtor remains absolute master of his property until the creditors take action under section 126 of the Bankruptcy Act, 1869, and a purchaser from him is not entitled to any evidence whether or not the instalments under the composition have been duly paid.—*Re Kearley and Clayton's Contract*, 47 L. J. Rep. Chanc. 474.

VENDOR AND PURCHASER.—*Recital of fact—Inaccurate statement—Interim injunction over a certain day, or until further order*.—The statement in a deed or instrument twenty years old that a person was, at the date of the execution of the particular instrument, seised in fee, is the recital of a fact, which, under 37 & 38 Vict. c. 78, s. 2, precludes a purchaser from requiring the production of or inquiring into the earlier title, unless he can show that the recital was inaccurate, the burden of proving which is on him.—*Bolton v. The School Board for London*, 47 L. J. Rep. Chanc. 461. *Semble*—Where an interim injunction is granted over a certain day, "or until further order," the injunction is not continued after the day named "until further order," but may be stayed before the day named by order of the Court.—*Ibid.*

JUSTICE OF THE PEACE.—*Notice of action—Bona fide belief of authority*.—Plaintiff having been taken into custody on a charge of concealing the birth of her illegitimate child, defendant, who was a justice of the peace, made an order for the examination of her person, under which order she was examined by a medical man. In an action against defendant for an assault, there being no authority at common law or by statute to make the order:—*Held*, by LOPES, J., that defendant was not entitled to notice of action under 11 & 12 Vict. c. 44, s. 9 (which provides for the giving of notice before any action against a justice of the peace for anything done by him in the execution of his office), inasmuch as though he might have acted *bona fide*, in the belief that he had authority to make the order for plaintiff's examination, there was nothing in fact on which he could ground such belief.—*Agnew v. Jobson*, 47 L. J. Rep. M. C. 67.

EVIDENCE.—*Witness too ill to travel—Pregnancy—Deposition*.—A woman may from pregnancy alone be "so ill as not to be able to travel," and her deposition thereof be admitted in evidence under 11 & 12 Vict. c. 42, s. 17.—*R. v. Wellings* (C. C. R.), 47 L. J. Rep. M. C. 100.

COMPANY.—*Directors—Agency—Fraud—Separable contract—Ultra vires*.—A person entering into a contract with a company cannot set up the fraud of the directors to which he was a party against the company.—*The Odessa Tramways Company v. Mendel* (App.), 47 L. J. Rep. Chanc. 505. Parts of an agreement can be separately enforced if an intention to separate the parts appear in the agreement.—*Ibid.* The fact that an agreement is carried out by two instruments affords a presumption that the contracts in the two instruments are separable.—*Ibid.* M. agreed in writing to take shares in a company, the directors at the same time by a separate instrument agreed to pay M. £4000 for services rendered. In an action for calls against M., the defence stated that the two transactions were made in pursuance of an agreement to issue shares, in breach of the company's articles, below par:—*Held*, that the defence was untenable.—*Ibid.*

COMPANY.—Voting at meetings—Demand of poll—Proxies—Election of director—Mandamus.—Where by the articles of association of a company registered under the Companies Act, it was provided, that at every meeting all questions should be decided by the result of a show of hands, unless immediately upon such show of hands a poll be duly demanded by shareholders qualified to vote, and holding in the aggregate 2000 shares or more,—*Held*, that the shareholders demanding a poll must themselves hold the requisite number of shares, and that it is not enough that by the possession of proxies they represent that number.—*R. v. The Government Stock Investment Company*, 47 L. J. Rep. Q. B. 478. Where a poll illegally demanded has resulted in the defeat of the candidate for directorship who had obtained the show of hands at the meeting, mandamus will lie to admit him to the office, notwithstanding its assumption and occupation by the candidate victorious on the polling.—*Ibid*.

PUBLIC HEALTH ACT.—Paving, etc., of private streets—Recovery of expenses from owners in default.—An owner of premises abutting on a street having received from the urban authority notice under section 150 of the Public Health Act, 1875, to pave, etc., such street, indorsed on the notice an authority to the urban sanitary authority to execute the works, and an undertaking to repay the costs on completion. On default of payment after demand made, the urban sanitary authority proceeded to "recover the expenses in a summary manner" before justices:—*Held*, that the owner having by the submission indorsed on the notice admitted the right of the sanitary authority to issue the notice, could not require proof to be given before the justices of the fulfilment of the conditions precedent to the existence of such right. The owner could not by such submission give jurisdiction to the sanitary authority, if in fact they had none, but he did thereby waive the proof by them of the preliminaries to the notice, and made it incumbent on himself to disprove their original authority, if he wished to dispute it.—*Lewis v. Cardiff Urban Sanitary Authority*, 47 L. J. Rep. M. C. 101.

MINES REGULATION.—Owner's responsibility for breach of general rules by another person.—Upon an information under the Coal Mines Regulation Act, 1872, s. 51 (enacting, by its last paragraph, that in the event of a breach of any of the general rules in that section by any person whomsoever the owner shall be guilty of an offence, unless he proves that he had taken all reasonable means, by publishing and to the best of his power enforcing the general rules, to prevent such breach), it appeared that there had been a breach of one of the general rules in that section (rule 22, requiring a machine used for lowering or raising persons to have certain appliances for preventing the rope from slipping), and that defendant was a joint owner of the mine in question. Defendant proved that the general rules were duly published, and that he had appointed as certificated manager the person who was joint owner and partner with him in the mine, and that he entrusted the entire management of the mine to his partner; he himself resided at a distance from the mine. He had not personally done any act towards enforcing the rules. The justices having found as a fact that defendant had taken all reasonable means, by publishing and to the best of his power enforcing the rules, to prevent the breach,—*Held*, that there was evidence upon which the justices might so find.—*Baker (appellant) v. Carter (respondent)*, 47 L. J. Rep. M. C. 87.

POOR LAW.—Derivative settlement—Parentage—Retrospective operation of that section.—A pauper had, previously to the passing of 39 & 40 Vict. c. 61, s. 35, acquired, before he was sixteen years old, a derivative settlement from his father; he had not acquired any settlement in his own right:—*Held*, that his derivative settlement was not taken away by 39 & 40 Vict. c. 61, s. 35 (abolishing derivative settlements except in the cases there mentioned), the Court being of opinion—first, that the section was retrospective as well as prospective, but secondly, that the exceptions were also, notwithstanding the use of future words, retrospective as well as prospective.—*Guardians of Westbury-on-Severn Union v. Overseers of Barrow-in-Furness*, 47 L. J. Rep. M. C. 79.

THE JOURNAL OF JURISPRUDENCE.

ROAD LEGISLATION.

At last, after much fighting, and not with general satisfaction, an Act has been passed relating to our Scottish roads, and calculated to effect a very material change upon the mode hitherto adopted for their maintenance. We propose digesting, for the benefit of our readers, this Act.

Lord Stair says (ii. 710) "that our custom sticketh not to the Roman distinction, but measureth the way according to the end for which it was constituted, and by the use for which it was introduced, as having only a foot road, or a road for an horse to be led or ridden on, or only a way for leading of loads upon horseback, or a way for leading of carts, or a way for driving of cattle, and is observed accordingly. There is another distinction of ways amongst the Romans, and with us in public and private ways. Public ways are those which are constantly for public use, and which go from one public place to another, or from one burgh to another, or from a burgh to a public port. This is called a highway." The right to traverse such roads is distinguished by Erskine from the right of servitude. "The right of a public road," he says (ii. 9, 12), "or king's highway, is not properly a servitude, but *publici juris*, common to all the members of the State, whether they are or are not the proprietors of any tenement, and indeed to all strangers who have the freedom of trade or of travelling through the country." Hence it is that a right of a highway may be vindicated by any member of the public, as was decided in the case of *Torrie and Others v. The Duke of Athol* (12th Dec. 1849, 12 D. 328, and 1 Macq. 65). The pursuers in that case were three gentlemen residing respectively at Edinburgh, Perth, and Aberdeen, and who therefore may fairly be taken as representing the general public. Their object was, as members of the public, to vindicate a right of way through a district with which they averred no local connection. Their title to do so was sustained both in the Court of Session and House of Lords. The attention of the Legislature has of course been directed to roads and their preservation

more and more as civilization advanced. We have old Scottish statutes relating at least to the highways connected with the towns and seaports. By an Act of Queen Mary, passed in 1555, it was ordained that "all commoun hie gates that free burrowes hes bene in use of preceedant outhor for passage fra their burgh or cumming thereto, and in special all commoun hie gates fra drie burrowes to the ports and havens nixt adjacent, or proceedant to them, be observed and keiped, and that uane make them impediment, or stop there-intil." This Act does not appear to have had the desired effect. The statute 1592, c. 159, proceeds upon the narrative, "that diverse malicious persons, upon deliberate malice stoppis and impedis publick passages pertaining to free burrowes within this realme." The mode adopted seems to have been by enclosing such roads within private ground, and compelling the public to "pass ane mile or twa about." A summary mode of application to the Lords of Session was provided, who were declared to be the only judges in such cases. This exclusion of inferior local judges from matters which naturally would fall under their jurisdiction possibly arose from the fact that such inferior judges might often, as territorial magnates, be interested parties. More peaceful times and increased commerce rendered the improvement of roads a more urgent necessity, and the number of Acts relating to them increased. Such statutes as those of 1669, c. 16, 1670, c. 9, 1686, c. 8, 5 Geo. I., laid down rules for their preservation, and provided a machinery for carrying out such regulations. Hence the Act 32 Geo. II. c. 15 could set forth that "great sums of money have been expended in amending and repairing the turnpike roads in that part of Great Britain called Scotland." This Act throws some light upon the kind of traffic to which the roads were then subjected. It attributes their ruinous condition to "the great and excessive weights which the number of horses, now allowed by law to draw waggons and other carriages, enable carriers and other persons using the said roads to carry upon the same. An additional toll of five shillings was to be levied upon carriages drawn by four or more horses, and travelling with more than eight horses was forbidden; any number might be used in the case of a steep hill. In order to encourage the use of broad wheels, carriages which had them might be drawn by three horses upon paying the toll for two. Every one has heard the lines which celebrate the achievements of General Wade—

"Had you seen those roads before they were made,
You'd have lifted up your hands, and blessed General Wade."

His work was begun in 1726, and carried out by soldiers employed at the rate of sixpence a day of extra pay. Probably after it was completed the Highlanders enjoyed better roads than did the inhabitants of many parts of England.

The Highland roads have been the subject of special legislation. The Act 43 Geo. III. c. 80 granted £20,000 for Highland roads;

and in the narrative of the subsequent Act, 59 Geo. III. c. 135, it is set forth that in addition £220,000 has at sundry times been since granted. The Acts 4 Geo. IV. c. 56, 5 Geo. IV. c. 38, and sections 16 and 17 of 14 & 15 Vict. c. 66, relate to them.

Prior to the Act of this year the leading road statute in Scotland was 1 & 2 Will. IV. c. 43, which contains a great number of enactments for the management of highways, and consolidated the previous legislation. Then there followed the amending statute 8 & 9 Vict. c. 41. The Act 12 & 13 Vict. c. 31 provided for the annual transmission of the abstracts and statements of road trustees, while the Trespass Act rendered it an offence to encamp or light a fire upon any road.

We now come to the Act of this year, 41 & 42 Vict. c. 51, entitled "An Act to Alter and Amend the Law in regard to the Maintenance and Management of Roads and Bridges in Scotland." We propose, under a few heads, to state very briefly its provisions; and first—

THE MODE OF ITS ADOPTION.

The Act finds an important difference amongst the various counties of Scotland. In some tolls continue; in others, by means of local Acts, they have been abolished. Then there are special regulations connected with certain bridges. In the case of counties (including the burghs wholly or partly within the same) within which tolls have not been abolished, the local Acts may still remain in force until 1st June 1883. Local Acts in counties which have already abolished their tolls are to continue until, by the adoption of this Act, they have been superseded. But any county may now adopt the new Act. In counties where, under local Acts, no tolls exist, or power has been obtained to abolish them, the resolution to adopt this Act requires a majority of not less than two-thirds of the statutory trustees; in other counties a simple majority of the Commissioners of Supply seems sufficient. In either case the resolution must be made at a special meeting, and only one such meeting can be held in the year. In the latter case the Act may be adopted, subject to a provisional agreement between the county and burgh or burghs situated wholly or partly within it. Such a provisional agreement requires confirmation by the Secretary of State. Power is also given to apply to the Secretary of State to enforce the adoption of this Act by a provisional order, which, however, requires confirmation by Parliament.

It will thus be seen that all counties which have not already abolished tolls must in less than five years fall under this Act by the operation of law. On the other hand, counties which have abolished tolls may still continue to enjoy their own special legislation; for the local Acts in such counties, even when limited in their duration, are now to continue in force until this Act has been adopted.

THE MANAGERS OF ROADS.

Under this Act county roads are now to be under a body, partly representative, called County Road Trustees. This body consists of (1) under certain restrictions, the Commissioners of Supply; (2) one representative from each corporation or incorporated company assessed upon an annual valuation of £800 or upwards; (3) certain ratepayers, called "elected trustees," being elected by the other ratepayers, and bearing in their number a ratio to that of these ratepayers—their election is to take place once in three years; (4) two persons elected out of their own number by the Commissioners of Police of any police burgh connected with the county; and in the case of a burgh the highways of which have been transferred to the County Road Trustees, its provost and a councillor, or senior magistrate and commissioner, as it may happen to be, are to be members of this Road Trust. All these representatives of burghs are held by the Act to be "elected trustees." This new Board, therefore, has one feature in common with our ancient Estates. It is composed of hereditary and life members acting along with popular representatives. Section 13 provides the mode of election by the ratepayers. The ballot has been abandoned, and "open vote" substituted. No Commissioner of Supply, or person whose qualification is derived from burgh lands, can vote. The chairman at such election is to be the ratepayer having the largest valuation; and in the event of an equality of votes, the candidate who is the largest ratepayer shall be deemed to be elected. The Sheriff has the power summarily, and by a final decision, to dispose of any question arising out of such an election.

These trustees are to be a body corporate, with all the privileges which attach to such a body. Their first and annual duty will be to appoint a "County Road Board," consisting of not more than thirty, of which number one-half only may be "elected trustees." An excellent system for the division of labour is provided by section 16. The county, except where it contains less than six parishes, is to be divided into districts, with district committees appointed. At least one-third of such committees must be "elected trustees." Persons having a special connection with districts are to be preferred as members of these local committees. Appeals relating to the boundaries of such districts must be made to the Secretary of State. The Board has power to fill up vacancies in the number of its elected trustees.

District committees are to make annual reports to the Board, who in turn must report to the general body of trustees. An appeal lies from any district committee to the Board, whose decision is final. Sections 21-24 relate to the meetings of the trustees. Under section 24, sub-section 6, it is provided that when the business relates to assessments, which are laid upon proprietors only, "no elected trustees" shall have a vote. No one except the

chairman (who has a casting vote) is to have more than one vote, although he may be possessed of more than one qualification, as, *e.g.*, the representative of a burgh, who is also a proprietor. The trustees may appoint a clerk, treasurer, collector, and, if necessary, a surveyor. They are to hold office during the pleasure of the trustees or Board. But power is given to enter into special written agreements, not to endure for a longer period than five years. District committees may also appoint district officers. Power is given to the trustees to award to officials acting under any local Act retiring allowances or other compensation.

Trustees are prohibited (sec. 111) from holding any place of profit under this Act, or participating in the profits of any contract entered into under it. At the same time, somewhat inconsistently, a trustee may be the partner of a company entering into such a contract, and may be interested in the sale of lands, or of materials, or in loans of money to the trust. He cannot, however, vote when his interest is thus concerned. A Sheriff or Justice of the Peace may be a trustee.

THE GENERAL MANAGEMENT.

When this Act is in operation the whole roads and bridges in the county are to form one general trust, all being, along with the debts and liabilities attaching to them, vested in the trustees. From and after the 15th, or at latest the 26th of May, after the voluntary adoption by a county of this Act, or otherwise from and after the 1st of June 1883, all tolls for roads and bridges are to cease, and highways are to be open to the public free "of tolls and other exactions." The provisions of the Railway Clauses Consolidation Act (8 & 9 Vict. c. 33) are, however, to continue applicable to all highways which are turnpike roads at the passing of this Act. Causeway mail may continue to be exacted in burghs for four years after the commencement of this Act, but in no case after 1887. In lieu of this latter tax a rate may be imposed by magistrates upon the occupiers of lands and heritages within burghs not exceeding threepence in the pound. Until they cease the tolls are to be received by the trustees under this Act when it is in operation. Under section 37 there are provisions for the allocation of assets and liabilities amongst the various trusts, whether created by this Act or under other Acts. Where a road does not lie wholly in one county, a power is given in the following two sections to appoint a joint-bridge committee in the case of a bridge uniting two counties. In so far as the management of the roads is concerned, detached portions of counties are to form part of the county by which they are surrounded, but this is not to have the effect of imposing upon such portions the assessments of the surrounding county. The assessment in counties is to be paid in equal proportions by landlord and tenant, except when the valuation of any property does not exceed £4 annually, in which case

the proprietor may be called upon to pay the whole, reserving his right of relief. The trustees are to have extensive power over the highways, a list of which they (sec. 41) are bound to make up. After giving due notice they may shut up one highway, or substitute another for it. In selling the toll-houses they must first make an offer to the adjoining proprietors.

Roads within burghs are under this Act to be vested in the local authority of such burghs, *i.e.* the Town Council or Commissioners of Police, as the case may be; but in the case of small burghs with a population not exceeding 10,000 the local authority may for an annual payment have their roads transferred to the county trustees. Burghs within counties where this Act is not in force may by agreement or otherwise assume the management of the highways lying within them.

The surveyors under the trustees are to lodge annually reports upon the state of roads, along with specifications of proposed repairs and estimates of expense, for the consideration of the Board. All over Scotland, whether this Act has been adopted or not, trustees may now recover, upon a summary application before the Sheriff, damages caused by excessive weight passing along a road. Special provisions are made (secs. 59-81) relating to road debts. The Secretary of State has power to appoint Debt Commissioners, and the clerks of the various trusts are bound to make out lists of the debts affecting each, to be deposited in their offices, and to be open to inspection. The Board or local authority has power to compromise a debt affecting the roads within its jurisdiction, and in the event of no private arrangement being made with the creditors, debts may be valued by the Debt Commissioners, who may be called upon to state a case in law for the decision of the Court of Session. Section 77 protects the interests of those who lend upon the security of assessments, rendering it incompetent for any ratepayer to question the validity of an assignation in security upon the ground that the provisions of this Act have not been complied with.

ASSESSMENTS.

The provisions relating to assessments are contained in sections 82-87. They are to be payable upon a day to be fixed not earlier than the 1st of November, nor later than the 1st of February. They may be collected in counties either by the collector under the Trust, or, if the trustees see fit, by the Commissioners of Supply. Appeals against assessments are to be disposed of by the Board. The power to recover such assessments vested in the trustees or local authority is similar to that "in the case of other taxes, and there is a preference in their favour in cases of bankruptcy. In burghs the tenant may be called upon to pay the whole amount of the assessment, having a right to deduct the landlord's portion from his rent.

Section 88 deals with the case of bridges which, although wholly within one county or burgh, accommodate the traffic of others. The Secretary of State has power, upon the recommendation of Commissioners appointed by him, to determine the proportions in which the burden of supporting such bridges should fall upon those benefiting by them. But his determination in such cases requires the sanction of Parliament.

The circumstances of the counties of Lanark and Renfrew have given rise to special provisions. In the case of these counties this Act is to come into operation upon 1st June 1882. The city of Glasgow and its suburbs are to pay annually the sum of £12,500 towards the cost of maintaining the roads, highways, and bridges within the counties of Lanark and Renfrew. If after five years the trustees of these counties or the local authorities of the burghs are of opinion that this assessment should be altered, they may apply to have this done by means of a provisional order from the Secretary of State, or other ways obtain the same result by a private Act of Parliament. The three wards of Lanarkshire are each to be deemed a county for the purpose of this Act. Amongst the other special provisions is one by which the Edinburgh Road Trust is transferred to the corporation of that city. By another tolls may continue to be levied at the Bridge of Ayr until 1st November 1897.

Under section 104 the trustees have power, subject to the approval of the Sheriff, to make bye-laws for the general regulation of traffic, and for prohibiting the use of improper wheels, or the erection of gates across highways. In addition, the following sections of the Act 1 & 2 Will IV. c. 43, already referred to, are to be held as incorporated in the present statute, viz. sections 80, 83, 84, 85, 87, 92, 94, 96, 108. These sections relate to the mode of obtaining materials for road-making, confer power to make side drains and ditches and to remove obstructions, compel owners of adjoining lands to cut their hedges, etc., regulate driving, create certain acts offences, and impose penalties upon the offenders. But with the exception of these sections that Act, as well as 8 & 9 Vict. c. 41, are to be no longer in force. Such, then, is a general idea of this Act, which has at last been brought to the birth. In some districts of Scotland which have already had the wisdom to adopt local legislation it may probably be viewed with indifference. In others the approach of the day upon which its adoption becomes a necessity will be viewed with dislike. Glasgow, we know, does not relish the idea of this new impost, which must at least be borne without remedy for five years. The second city in the empire has protested in vain, and only incurred a rebuke from the Home Secretary. We have, however, as Scotchmen, the consolation of feeling that a statute of some importance, and certainly great bulk, relating solely to this country, has actually been carried through the House of Commons.

ON CERTAIN PRINCIPLES AFFECTING THE LIABILITIES OF MASTERS AND SERVANTS.

NO. VIII.

TURNING once again before concluding our review of the subject to its more peculiarly legal aspect, we do not find any symptom, even to the present hour, that any change or modification in the strictness of the rule of law now laid down is likely to arise, at least from within the judicial circle itself. The tendency has been (as the tendency of law always is) to strengthen previous judgments, to pile up authority upon authority, until at length from even a judge himself may be wrung a reluctant assent or submission to what has been decided—an assent given, perhaps, with a feeling at heart that his judgment would be very different did not precedent, that law of the Medes and Persians, close his lips. That such is sometimes the feeling may be seen from the observations of the learned judges in our own courts when advising cases wherein questions of liability occur involving the employers and their managers. Still, all this feeling notwithstanding, the stern rule once laid down, once admitted to a place upon the roll of decided cases, has come, not merely to have an authority of its own, but to foster the development of subtleties and restrictions never at the outset contemplated. Instead of travelling on in the direction of alleviating the misfortunes caused by any serious mine accident, for example, we are really losing ground, and becoming embarrassed by the retrograde action of the rules of law already laid down.

The extreme point to which the present rule has been carried could not, perhaps, be better illustrated than by the recent case of *Conway v. The Belfast and Northern Counties Railway Company*, decided on appeal in the Irish Exchequer Chamber, February 3, 1877 (1 I. R. Common Law, xi. 345), to which our attention has been called. Practically what that decision tells us is that the law has said that the traffic manager of a railway company and a milesman in the same company's service are fellow-servants, and that the negligence of the former will not render the company liable for injuries caused thereby to the latter. Chief Baron Palles, in giving judgment, said that the authorities appear to establish two points: "*First*, that there is no distinction as to the exemption of a common employer from liability to answer for an injury to one of his workmen from the negligence of another in the same employment in consequence of their being workmen of different classes; but, *secondly*, that a master may so depute to another the entire control of his establishment as to constitute such other person, as between himself and the workmen in his establishment, not a fellow-servant having greater authority, but the *alter ego*, or representative, of the master, and that for the acts of such a person the master would be

responsible to a fellow-servant." As to the first of these legal propositions, there can be no doubt that the decisions clearly establish it; but on the second point we confess to feeling some difficulty, for the questions at issue in the case of coal-mines very often show that the manager of a mine is altogether quite free of the master, and that there is absolute delegation of duties, and yet the master is not liable. Chief Baron Palles goes on to say he is not able to find anywhere an attempt to define strictly "when the character of 'servant' having greater authority than others ceases, and that of representative, vice-principal, or *alter ego* of the master is acquired." There, indeed, lies the difficulty of the proposed legislation by those who do not like the present state of the law, but we think rather that the authorities point to a refusal of the Courts to admit at present of any such delegation, and to an exemption of the master in all cases where he was not personally involved in the causes of the mishap. The learned Judge indicates a line of demarcation drawn very high indeed, which would involve the employer only when he had abnegated his authority, so that "nothing done by him (that is, the representative) in relation to the business over which he has control would be an act unauthorized by the master."

Looking back through all the legal decisions pronounced in questions of this kind, and upon the conflicting opinions to which they have given rise, we cannot but think that after all the chief difficulties underlying the whole matter are, in a few words, these: First of all, if an accident occurs, if numberless workmen are slain or maimed, are the poor people themselves to stand the loss?—that is to say, in most instances, is the country to stand the loss? for in the relief of the pauperized, through the medium of the rates, the country practically does pay for it all. Secondly, if the country is not to pay in this way, who is to pay? Now, if we consider these two questions attentively, probably the answer given will depend upon whether the relief (for relief in some shape it is) is to be given as charity, or as compensation, or as insurance.

The first plan, that of allowing the accidents to fall ultimately upon the country, either through the medium of public or private charity, is the existing method. All people seem to agree that the present state of things is unsatisfactory, though some are reactionary, and some are progressive in their opposition. Putting aside all sentimental considerations, it is very disadvantageous to the State, as such, to continue to permit a state of matters highly conducive to the increase of pauperism, by which we mean the increase in the number of those who receive aid from the poor-rates. It is maintained by many of those who ought best to know, that nothing is so degrading to a people as enlarged pauperism, because it deprives them of a healthy manliness, and renders them servile and contemptible. Efforts are therefore constantly made to check the flood of relief now annually dispensed, and we are often warned to remember the days of ancient Rome, and those largesses and bounties which relieved the poor but

ruined the character of the nation, and hastened its fall. With these considerations before us we should certainly seek to avoid and check the causes which lead to enlargements of public charity. Nor can much less be said as regards private aid: it may be less degrading, but it is not satisfactory, and it is too often either indiscriminate or select. If we are, then, to have a change, it must either be in the form of a compensation for injury, or of an insurance. In too many of the discussions as to this question the distinction between compensation and insurance has been lost sight of, though perhaps they may not have been confused in the Hibernian manner of the student who, being asked to define insurance, replied that it was a compensation paid to a man for his death.

Compensation for injury would at once involve us in many difficulties. In the first place, it would tend to promote litigation, and litigation of the worst kind, namely, that between class and class. Then again, all sorts of questions would arise as to the amount of compensation proportionate, or deemed proportionate, to the wages of the injured man; and moreover, the uncertainty as to such a sum, greater or less, would paralyze trade. It is here we can note the distinction. Compensation for injury does not in itself by any means necessarily affect trade, but once introduce an element of uncertainty, and trade ceases to be trade, and becomes mere speculation. A system of insurance would, however, probably—as we hope shortly to show—meet the difficulty, but not in many of its features such a system as that advocated by Mr. Joseph Brown.

It is said that the profits of employers of labour are often very uncertain—one year a gain, the next year none; but all that has really no important bearing upon this question put in the way in which it has been proposed, because the charge made by the “producer,” as he is termed, to the consumer, is one calculated to cover the risk. Were it necessary, this sum on any or every article could be readily calculated. In a communication upon this subject anonymously addressed to the public press we find the following sentence bearing upon this. The writer says, “Insurance offices have no hesitation about intimating the risks, and insuring against them for premiums fixed upon reliable statistics. These statistics show approximately the risk under this head attendant on any dangerous trade.” We see, then, that the proposed change would not really affect the employer, who would turn to the public, and by a charge on his commodity would recoup himself. Again, it would not affect the working-man, for his wages, we cannot believe, are based upon any “premium for risk” calculation. If when good times come the workman thinks he is able to live luxuriously, and perhaps foolishly does so, yet also in those times can the employer reap his golden harvest. We remember an instance, not many years ago, in the Second Division, where an estate of £2500, left by the testator in trust at his death for behoof of his children, had within three years increased till there was over £15,000 invested and some £5000 more

still in the colliery. This indeed would show that not only the workman but the employer was profiting by the state of the market. But we are doing the very thing for which we formerly animadverted upon Mr. Macdonald's speech, namely, going into details and discussions as to minor questions, and letting the main one slip. The same writer to whom reference has just been made may be perhaps quoted as to this "consumers" question, for it is put most forcibly :—

"Railways cannot be run or mines worked without accidents arising from various causes (frequently the negligence and rashness of servants necessarily employed), all productive of suffering and loss, which must fall somewhere. These are shown by statistics to be of such constant and regular occurrence that insurance offices have constructed a business on them. Is it, or not, fair and reasonable to regard them in the lump as incident to and inseparable from the trades, and so such as ought to fall, not on the immediate sufferers, but on the public, for whose convenience the trades are carried on? If so, the traders ought assuredly to pay in the first instance, and charge the estimated cost (and it is capable of pretty exact estimate), on those who consume their commodities or benefit by their services. Should it appear that this result is substantially attained under the existing law, there is no need to change it; but otherwise it is not defensible."

There is, however, yet another proposal, to which we think probably it might be necessary to direct attention in any legislation upon this subject, and that is one of the points referred to by Mr. Joseph Brown, Q.C., in his pamphlet already mentioned, the limitation of this liability for injuries. His view, as there expressed, indicated an absolute limitation, so that it would matter not a whit whether you drove over the crossing-sweeper or the Attorney-General. Mr. Gorst no doubt in the debate pointed out how the indulgence in such expensive destructiveness as the latter exploit might ruin any small tradesman; but that remark was made in connection with an observation that the jury usually considered the depth of the defendant's pocket in such a case, and tempered their judgment with mercy accordingly. Probably this is so far true, but we venture here to offer a suggestion that such powers of giving damages should not be conferred upon juries without check. A certain relation between the earnings of the deceased and the amount of the damages claimable by his representatives might be statutorily fixed, and such a regulation would further simplify the estimate to be made by each "producer" of the risk, to be paid for primarily through the medium of himself, but ultimately by the consumer.

In concluding this series of articles, we find ourselves, as the result of inquiry, placed in the position of disagreeing with the recommendations of those who would rather tinker at the present rule of law than adopt some scheme calculated to put an end

to questions otherwise ever liable to reappear in new shapes and under new conditions. The Committee of the House, as we have learned from their report, recommended that "where the actual employers cannot personally discharge the duties of masters, or where they deliberately abdicate their functions and delegate them to agents, the acts or defaults of the agents who thus discharge the duties and fulfil the functions of masters should be considered as the personal acts or defaults of the principals and employers, and should impose the same liability on such principals and employers as they would have been subject to had they been acting personally in the conduct of their business, notwithstanding that such agents are technically in the employment of the principals." This, with an expression of opinion hostile to the extension the law has given to the doctrine of common employment, constitutes practically the result of the labours of the Parliamentary Committee. Indeed, it is but a very small result. The alteration would introduce all manner of new questions, and having drawn the line in one place or another, there would be a continual agitation for a change so as to meet this case of hardship, or that point of difficulty ever inseparable from any such hard and fast rules. Insurance is to us the only remedy which appears capable of being worked out to satisfactory conclusions; but we do not entirely endorse the views offered for example by Mr. Brown, Q.C., and others. In the very outset of that scheme there is a feature calculated certainly, we think, to ensure its rejection. There is a proposal, in fact, to tax not only the master, but also the men. The master no doubt is taxed solely for accidents where his fault, or his constructive fault, is involved, and the man only where he himself is to blame; still the fact remains that the men are taxed, and the resistance made to this would infallibly wreck any bill containing such a provision. The men have their own societies and benefit funds, and this would be a compulsory interference with them. Again, there is the feature of an absolute limit of liability, or, as we understand, the amount recoverable by any one man or his representatives shall never exceed a certain fixed sum. To this again we demur, on the ground that what is ample in the way of insurance for one class of workmen is not nearly adequate in the case of another.

We venture, however, to offer two alternative schemes for legislation. The first of these is based upon the principle of insurance, and depends upon compulsory insurance by the master. The workmen are insured in a body, not singly, and a slump sum is paid as yearly premium, much as is done, according to Lord Shand's statement, in Germany. At the same time, however, while insuring all his men together, the master could arrange for the recovery of different sums of money corresponding with the number of persons employed at different scales of wages. No deduction whatever would be made from the wages of the men, and therefore

the existing benefit and friendly societies would continue to thrive and perform a good work. It would be so arranged that any master who neglected to insure would be liable to an action for damages in which he would have to defend stripped in the first place of all the technical pleas now competent, and liable also in damages to which no limit would be assigned. A fine of considerable severity for each workman uninsured would also be imposed. Further, where payments were made the mode in which the recipient obtained the money might be regulated according to circumstances by the inspector of mines in the district, in order to check abuse, and to prevent the fund being squandered.

Under such a system the workmen would retain their existing societies to provide for them in case of accidents of all kinds, and to meet the privations consequent upon the sickness or death of those who supported their families by their labour. The masters would have to pay their men compensation out of this insurance money in all cases where the sufferer had not himself to blame; for when a man by his own folly or neglect caused injury to himself, it is clear that to make an employer pay would be utterly indefensible if only on grounds of justice. If it be true, as alleged by employers, that so many of the accidents are due to the folly of the victims themselves, this should much reduce the amount of the premiums the masters would have to pay, for naturally such considerations would be taken into account by the insurance companies. The man would have the insurance, however, to protect him against the neglect or fault of the workman at his side; no "collaborateur" defence whatever would come into play; and unless there were contributory negligence on the part of the victim, the insurance fund would have to pay.

So much for one suggestion which has occurred to us. The other is based upon what would at first sight seem a very different principle. It depends upon the imposition of a fixed tax upon the article of manufacture or the mineral obtained. This tonnage rate, as it may be called, would be collected by the Government, and the proceeds would be administered by its officers. The amount would of course depend upon the risks of the particular branch of industry; in some it would be higher, in others less, but the result would be that the injured person would have a claim, and that neither master nor man would be directly taxed. The carrying out of this scheme would not, we think, be attended with any great difficulties, at least as to the estimation of risks; for, as every one knows, fire insurance companies, for example, classify various buildings according to their risks, and charge upon these classes proportionate rates, just as the Government would do. What we consider the drawback to the proposal, however, is, that the direct interposition of the executive is invoked, and accordingly officialism would become too much a feature of our mining and manufacturing enterprises. After all, it really comes to much the same, indeed to

quite the same in the end, whether masters pay a premium, which they ultimately charge upon their customers by raising their prices, or whether they pay to the Government a tax which the Government in turn employs just as the insurance company do the premiums. The public have to pay for the change in the law by the change in the price; they reap the benefits, and it seems but just they should contribute the cost. The less dangerous the trade or manufacture or mining operation, the cheaper the public will get the goods or minerals they desire; the lower the Government tax, if that is to be the shape of the remedy, the smaller the insurance premium, if we turn in preference to that mode of relief. We cannot see the hardship in the case in which the public have a trifle more to pay; we do see and feel that as things now stand there is a hardship and an injury to which, as surely as it is there, a remedy must exist.

We have endeavoured to place together the tangled threads of many discussions arising out of the Laws of Liability as they now exist, and we can only hope that if the difficulties have not been surmounted, or if the suggestions made seem impracticable, at least some good may have been done by placing this moot subject in a full, fair, and intelligible light.

RESPONSIBILITY IN DELIRIUM TREMENS.

It is to be hoped that the reporters will, sooner or later, give the profession some reliable and permanent account of the extremely interesting discussion on the question of criminal responsibility in cases of *delirium tremens*, which occurred in the case of *Andrew Granger* at the recent Inverness Circuit. If under the present system of reporting there is any possibility of such a case not being reported, an arrangement should at once be made to prevent such misfortunes in the future. We do not propose to narrate the circumstances which preceded and followed the crime committed by Granger; for although the Advocate-Depute endeavoured to represent the case as one of simple intoxication, there does not seem to have been any serious doubt in the mind of every one else connected with the trial that the panel was both before and after the fatal stab suffering from *delirium tremens vel potatorum*, from that *mania a potu* which in its acute form is often accompanied by suicidal and homicidal tendencies. This, at least, was the view of the jury, who "unanimously found the panel guilty of culpable homicide, believing the act to have been committed while he was suffering from *delirium tremens*, and therefore not amounting to murder." It had been strongly contended by the counsel for the prisoner that the facts proved concerning the latter's mental condition amounted to temporary insanity, and that on this ground a verdict of not guilty should be returned. This argument proceeded

on both principle and authority. The responsibility of intoxicated persons was of course admitted (a responsibility, by the way, which is more theoretical than practical); but it was argued that where a course of drinking, followed, as apparently in this case, by a short period of abstinence, had produced *delirium*, the panel was then labouring not under intoxication, but under disease, with a clouded intelligence, and no power of restraint. The authority cited for calling such a condition insanity was the well-known passage from the charge of L. J.-G. Inglis in the case of *Alexander Milne* (Feb. 9, 1863, 35 S. J. 470): "The doctrine of criminal responsibility is exceedingly simple. If a person knows what he is doing, if he knows the act he is committing, if he knows also the true nature and quality of that act, and apprehends and appreciates its consequences and effects, then he is responsible for what he does. If he does *not* know what he is doing, or though he does know that, cannot appreciate or understand either its nature or quality, or consequence and effect, then he is not responsible, provided that he is in that condition through the operation of mental disease. . . . If you think the prisoner was under the influence of insane delusions when the act was committed, there is no use inquiring whether he knew right from wrong. . . . Weakness of mind combined with moral depravity is not insanity. But if the mind be diseased there is insanity, which will take away criminal responsibility. It does not signify what the exciting causes of that disease may have been. It may be drunkenness, or indulgence in any other vicious propensity." This is by far the most rational statement of the law which has been made from the Scottish bench. We wish it were accepted and followed by all the Commissioners of Justiciary. Some, however, seem to proceed, as L. J.-C. Hope did, on the principles laid down by the English judges in *Macnaughten's case*, which involve certain arbitrary and exclusively intellectual tests for the purpose of deciding the question of criminal responsibility. For instance, Lord Deas has, we dare say, as clear a notion of what constitutes legal insanity as any living judge. Then why, if *Milne's case* be sound, does he say in *Dingwall's case* (Aberdeen Circuit, 1867), "If the jury believed that the prisoner when he committed the act had sufficient mental capacity to know, and did know, that the act was contrary to the law and punishable by the law, it would be their duty to convict him." Literary critics have lately attempted to revive public interest in the morbid romances of Brockden Brown. On Lord Deas's principle it is clear that the lunatic hero *Wieland* ought to have been executed for the murder of his wife and children. The value of *Milne's case*, on the other hand, is that, while no doubt defining the general conditions of insanity, it does not sink the *factum probandum* in the evidence or *indicia* of the fact. It does not, indeed, hand over the question to the doctors, but it places very little restriction on the jury giving legal effect to the conviction they may form that the panel is insane. Moral insanity it

does not provide for, except in so far as this may be accompanied by intellectual delusions, which might of course be the subject of inference merely as well as of observation. The doctrine of Milne's case entirely differs from the old common law of Scotland, which required "total deprivation of reason and understanding" (Thomson, June 18, 1739), "*ut continua mentis alienatione, omni intellectu careat.*" This was probably relaxed in practice; for we find Baron Hume complaining with reference to such cases as Cummings (1810), Gates (1811), and Hoskins (1812), that it is "questionable whether the assize do right when they sustain the plea of this lower degree of infirmity of mind, exasperated only into a short fit of outrage or fury by excess of liquor" (Commentaries, i. 41). Besides the case of *Milne*, which was cited for the general doctrine of insanity, Granger's counsel referred to a case of *Murray* (High Court, 1858), in which L. J.-C. Inglis is said to have laid down that a person suffering from *delirium tremens* is to be treated as insane so far as criminal responsibility is concerned. It is a singular proof of the want of system, we might almost say of the amateur and dilettante fashion in which legal reports are sometimes got up, that while *Murray's* case is twice noticed in the second volume of "*Irvine*" upon other points which were probably argued *in banco*, no notice whatever is taken of this extremely important dictum which Granger's counsel seems to have disinterred from an able article in this *Journal*, by Sheriff Dove Wilson, on the subject of homicides committed during intoxication. The only other authority cited was that of *Gerard v. Gregor* (8th Dec. 1855, 28 S. J. 79), where the High Court held that the Sheriff of Elgin had acted properly under the old Lunacy Act, 4 & 5 Vict. c. 60, in ordering Gerard to be detained in an asylum, "as being subject to fits of furiosity, and when in that state dangerous to his family." Of course the issue raised under that statute was not the issue of criminal responsibility. Public authority might interfere for the protection of the lieges without surrendering its right to punish. But the two questions are nearly related, and in Gerard's case the furiosity, though complicated by epilepsy, was the result of a course of drinking, and was accompanied by the delusions which are almost characteristic of *delirium tremens*. From Lord Deas's opinion it would appear that the case of *delirium tremens* had been mentioned as probably falling under the statute. Such were the authorities in Scottish law on which the argument in Granger's case was based. The references to English, Continental, and American law were properly made, but could hardly be expected to affect the result any more than the opinions of eminent medical jurists, however unanimous. Indeed, the citation of the German code was unfortunate; for with a rather alarming loyalty to scientific definition, it proclaims that "persons deprived of the use of reason by drunkenness are, while that condition lasts, regarded as insane." They may be punished for getting drunk; they may be

shut up as delirious and dangerous; but they cannot be punished for an evil deed which they did not, while sane, either conceive or intend. This is the converse of the law of Pittacus, which inflicted one punishment for the crime committed by the drunkard, and another cumulative penalty for getting drunk. Lord Deas's judgment in Granger's case does not go the length of saying that particular cases of *delirium tremens* might not amount to insanity and lead to acquittal on that ground. He says: "It would be a startling doctrine to say that if any man by a course of hard drinking—it may be by a very recent course of drinking—has brought on an attack of *delirium tremens*, severe or not severe, he may commit as many homicides as he likes and no punishment shall follow. . . . I don't mean to say that *delirium tremens* can never entitle a prisoner to be found not guilty." He then refers to the fact that Granger had for many years been a successful farmer, and that there was no trace of constitutional insanity, and that even while under *delirium tremens* he had been well aware of what was passing around him, and that he had exposed himself to punishment. On the authority of Dingwall's case, therefore, Granger was liable to punishment. On the same authority, and that of Maclean's case (High Court, October 1876), Lord Deas held that the weakened state of Granger's mind might properly be taken into view in reducing the crime, as the jury had done, from murder to culpable homicide; and also in fixing the sentence, which was one of five years' penal servitude. For this decision the authority might also have been cited of *James Ainslie*, 17th January 1842, who received a mitigated punishment on the ground that, "owing to severe wounds on the head, he became furious under the influence of intoxicating liquors" (Bell's Notes to Hume, i. 5). The same *species facti* as in Ainslie's case, was in England, in the well-known case of *Macdonough*, held to amount to insanity; and Sir Archibald Alison indicates an opinion that the Scottish law would also recognise a case of insanity supervening from drink where there was a previous wound or injury predisposing to mental disturbance (i. 654).

No one will find much fault with the practical result in Granger's case; for while a verdict of murder was obviously out of the question, the panel had undoubtedly been living in a very reprehensible way, and he is likely to benefit from the sharp sentence of penal servitude which he has received. But the procedure and the decision it is perhaps difficult to reconcile with strict legal principle. After the jury had found that Granger was not insane, and was therefore guilty of culpable homicide, how could it be maintained that he was insane, and therefore entitled to acquittal? How was it possible for the Judge to apply to the verdict a judicial opinion that *delirium tremens* must amount to insanity? He had no materials for such an opinion, and, if he had, how could he enforce it on a jury which had just decided the matter of fact subject to his own

directions? *Delirium tremens* can hardly be represented as a *nomen juris*; it is, on the contrary, a medical term of considerable elasticity. To give effect to the argument of Granger's counsel would have been to withdraw the fact of insanity from the cognizance of the jury; for if they had been told that *delirium tremens* meant in law insanity, then they would have given another name to the maniacal excitement under which the panel, though in their opinion sane, was suffering. Nor are the views of the Bench altogether beyond the reach of criticism. Lord Deas's test of insanity may not have been satisfied in this case, though there was not much evidence to show whether Granger knew at the time that his act was punishable by law. This is always a very hopeless inquiry. But the principle on which Lord Deas supports the law is that the panel has brought himself into his present condition; and apparently that to sustain a defence of insanity in such a case would encourage people to get into *delirium tremens* for the purpose of committing homicide. The apprehension is not a very serious one, for most people, desirous of committing homicide, would prefer to remain sober in order to insure success. But the reasoning is totally opposed to the authorities which establish that the defence of insanity must be sustained even where the insanity has been directly caused by the panel's own acts of excess. Most medical men would call *delirium tremens* a mental disease, and culpable homicide is a term vague enough already without being extended to the case of homicide committed during *delirium tremens*.

TWO RECENT RAILWAY CASES.

To repeat shortly from last month's issue the result of our examination so far of the two cases which form the subject of notice, we endeavoured to point out that the interpretation put by Lords Ormisdale and Gifford, in the case of *Menzies v. The Highland Railway Company*, upon the 101st and 102nd sections of "The Railways Clauses Consolidation (Scotland) Act" (which correspond with the 108th and 109th sections of the English Act),—to the effect that a railway company is entitled "summarily to interfere" and remove, as a hindrance, a passenger who enters a train without a proper ticket for his journey,—was at variance with that adopted by Lord Chief-Justice Coleridge and Lord Moncreiff. And we may go further than that; for the Lord Chief-Justice, as we have already stated, is at pains in the other case of *Watson* to point out that the power conferred on railway companies by the 108th section of the English Act to enact bye-laws—such, for example, as those on which railway companies are here founding—has nothing to do with the issuing of tickets or their personal relations with the travelling public. His Lordship would apparently deny their power to make

bye-laws under this section, except where these are required for regulating the internal economy of the railway and its traffic, or the conduct and management of their service of trains, or the arrangement of a time-table, or suchlike. That, as we apprehend it, is what his Lordship means. So that it would seem that the whole bye-laws of a railway company, at any rate all such as inflict a penalty in such cases as those with which we are here concerned, whether there be fraud or not, would thereby be held to be incompetent. That is a somewhat startling proposition, but it is nothing more than a very moderate deduction from the view taken by the Lord Chief-Justice in the opinion which we quoted last month. But there are other points of interest, peculiar perhaps to each of the two cases independently of the other, which are well worth noting.

The Brighton Railway Company failed before the Court of Common Pleas for other reasons besides that which we have stated. The learned Judges in that Court held the bye-law void not only because it was unauthorized by the railway statutes, but also because it inflicted a penalty of an unreasonable nature. Under it, for example,—and we may here assume that the bye-laws of all railway companies are very much alike,—a passenger from Dunbar to Edinburgh, who had taken his seat without a ticket, would be compelled to pay the whole fare from the place—say London—from which the train had originally started. There would be no difference as regarded the amount of the money payment in that case and in the case of a passenger who had travelled the whole journey from London without his ticket. No distinction in the sum demandable where there is no ticket is made under the bye-law, as regards the distance of the journey, nor is there any discrimination shown between a case of the grossest fraud and one of the purest accident. Whether the amount of the fine is liable to be curtailed under the provisions of the Act of Parliament which restricts railway companies in the fares they are entitled to exact from passengers or not, is another point on which the Lord Chief-Justice in his opinion attacked the bye-law,—for, from the explanation we have given above, it will be obvious that in many instances the sum exigible where there is no ticket will largely exceed the legal fare. And it is noticeable, as strengthening the affirmative view of this question, that the term used in the bye-law is found to be “fare,” and not a word denoting “penalty” or “fine.” Indeed, one contention maintained by railway companies, in cases in which these and similar questions have been raised, is that the extra fare is not at all a penalty, but is more of the nature of compensation,—compensation, we suppose, in respect of the precautions which railway companies have to take, and the expense to which they are put to insure themselves against fraud. But how they can justify a claim of this kind brought against the innocent passenger who has heedlessly taken his seat without his ticket, or who has dropped it by accident

over the window, it is not very easy to see. That argument seems to have been adduced before the Court of Common Pleas, and the Court was referred, as supporting it, to the case of *Chilton v. The London and Croydon Railway Company* (16 Meeson and Welsby, 212, 16 L. J. Exch. 89). That was an action of damages against a railway company at the instance of a passenger who had accidentally lost his ticket during his journey, and who, on declining to pay more than the fare from the station at which he had joined the train, was assaulted by a railway official in consequence and taken into custody. The bye-laws under which the company proceeded in that case were framed in terms of a private Act of Parliament passed previously to 1845, and so far the case has no bearing on the subject in hand. But the observations of Lord Wensleydale, Lord Cranworth, and Baron Alderson are important, in so far as these eminent Judges individually stated opinions to the effect that the fare demanded by the company was not a "penalty," but was a reasonable compensation which the company were entitled to demand. These views have been taken exception to in the recent case of *Brown v. The Great Eastern Railway Company* (June 7, 1877, L. R. 2, Q. B. 406), but in neither the one case nor the other, unfortunately, can the opinions of the Judges on this point be quoted as more than *obiter dicta*. They were not necessary to the decision of the cases. Lord Chief-Justice Coleridge, in his opinion in Watson's case, adverts to Chilton's case, and takes the opportunity of saying that he disagrees with the views attributed to the Judges who decided it, and sides with Mr. Justice Mellor and Mr. Justice Lush in the opinions they expressed in Brown's case.

Further information on the question of the legality of bye-laws such as those before us will be gained by a perusal of the recent English case of *Bentham v. Hoyle* (January 17, 1878, L. R. 3, Q. B. 289), where the Lord Chief-Justice Cockburn expressly lays down that if fraudulent intention is not present, no penalty can be inflicted, because otherwise the bye-law would be repugnant to the terms of the railway statutes.

We now pass from this to say a few words upon that phase of the case of *Menzies* which deals with the due publication of the condition under which the railway company issued a ticket to Sir Robert. His return ticket from Aberfeldy to Perth had upon it only the words, "Perth to Aberfeldy—first class—Saturday fare—not transferable." And the contention of the railway company was that the words "Saturday fare," and the time-bills at the station, bearing that "local return tickets are not available on Sundays," and that return tickets issued on Friday "are available to return on the following Saturday or Monday," were sufficient notice that the ticket was not available on Sunday. The ticket, it must be remarked, made no reference to the time-bills, although it was in evidence that tickets on which the words "not available for Sunday" were printed were in the hands of the stationmaster at Aberfeldy,

but were not used because the previous supply was unexhausted. Lords Ormidale and Gifford were quite clear that there was sufficient intimation by the railway company. Therein their views differed from those of the Sheriff (Lee), whose opinion, we should have remarked, in the other branches of the case, as given in a very distinct note appended to his interlocutor, appears to be quite in harmony with the decisions in the English courts to which we have referred. The Lord Justice-Clerk upon this point, as upon the matter of the bye-laws, preferred to reserve his opinion; but so far as he does express one, he again differs from his brethren.

In the course of the discussion the recent case of *Stevenson v. Henderson and others* (June 1, 1875, H. of L. 2 R. 71) was cited, but it is not commented upon or referred to by the Judges. It was a case where a passenger brought an action of damages against certain steamboat proprietors for the loss of his luggage, and where they pleaded exemption in respect of a condition printed on the back of the ticket which their clerk had issued to him to this effect: "This ticket is issued on the condition that the company incur no liability whatever in respect of loss, injury, or delay to the passenger, or to his (or her) luggage, whether arising from the act, neglect, or default of the company or their servants or otherwise. It is also issued subject to all the conditions and arrangements published by the company." There was nothing upon the face of the ticket to direct attention to the back of it, and the attention of the passenger had not otherwise been so directed. Neither had he seen the time-bill and other notices of the company which were hung up in the office. The Court of Session found that the defenders were not relieved from responsibility by the writing in question, and on appeal the House of Lords affirmed their decision. The Lord Chancellor (Cairns) remarked in giving judgment in that case: "It seems to me that it would be extremely dangerous, not merely with regard to contracts of this description, but with regard to all contracts, if it were to be held that a document, complete upon the face of it, can be exhibited as between two contracting parties, and, without any knowledge of anything besides, from the mere circumstance that upon the back of that document there is something else printed which has not actually been brought to and has not come to the notice of one of the contracting parties, that contracting party is to be held to have assented to that which he has not seen, of which he knows nothing, and which is not in any way ostensibly connected with that which is printed or written upon the face of the contract presented to him." Lord Hatherley again says: "A ticket is in reality in itself nothing more than a receipt for the money which has been paid. Of course terms may be imposed by the carriers, and parties may agree to such terms in derogation of their rights. Numerous authorities were cited by the counsel for the appellants, but all those authorities, I may say, either showed (which the majority of them did) an actual signature of the party,

binding him somewhat stringently to certain conditions, or they consisted of cases in which the pleading had been that, whether there had been a signature or not, there was an agreement, and that was admitted," etc. Lord O'Hagan says: "When a company desires to impose special and most stringent terms upon its customers in exoneration of its own liability, there is nothing unreasonable in requiring that those terms shall be distinctly declared and deliberately accepted, and that the acceptance of them shall be unequivocally shown by the signature of the contractor. So the Legislature have pronounced as to cases of canals and railways, scarcely distinguishable in substance and principle from that before us."

Had a new ticket with the special marking been issued to Sir Robert, nothing would have been wanting so far as the legal requisites for notice go. But that when he took out a return ticket which he was informed was to be available till Monday, there was also incorporated therewith the condition that it was not to be available on Sunday, as the railway company successfully contended, appears at first sight hardly consistent with the dicta in the case of Henderson. It would of course be impossible for a railway company to set out on a ticket all the regulations under which they contract to carry travellers. And this is the ground taken both by Lord Ormisdale and Lord Gifford. The latter says: "I think that every one who buys a return ticket, or indeed any kind of ticket, is bound to satisfy himself of the conditions on which it is issued. The railway company cannot print all these conditions on the ticket itself—that would make each ticket a little volume. Still less can the railway company read the regulations to every purchaser, and the only alternative is that all tickets must be held as purchased under the terms and conditions contained in the regulations and bye-laws of the company, duly approved and duly published, and with reference to the trains and hours shown by the current time-tables of the month. This does not make it the less expedient to print the leading features of a return ticket on the ticket itself, but if any question of ambiguity or detail arises, the reference must always be to the published regulations and bye-laws of the company." So that in Lord Gifford's view it was not a leading feature of the return ticket that it was not to be available for the Sunday which intervened between the Friday and the Monday, for which period it was admittedly issued.

Another interesting question suggested by the case of Menzies is presented by the fact that it was by a train to Ballinluig Station, at the junction between the branch line to Aberfeldy and the main line, that Sir Robert travelled, there being no trains to Aberfeldy on Sunday. Lord Ormisdale again expresses his view that he had no right to do so. "His ticket," his Lordship says, "bore merely that it was issued for his conveyance to and from Aberfeldy and

Perth, Ballinluig not being mentioned or marked upon it at all. The regulations, again, to which I have referred, not only do not authorize any departure from the terms of the ticket, but are unequivocally to the opposite effect." The Lord Justice-Clerk declined to assent to that general proposition, but so far as the case goes, the point remains open and undecided.

In thus calling the attention of our readers to the leading features of the two cases, and giving them further publicity, our object has been served, and we are content to leave them thus, in the belief that any apparent discrepancies and inconsistencies in the law as laid down in the two countries will in time disappear. The issue of the English case in the higher tribunals to which it has been taken will no doubt be awaited with anxiety by all railway companies. Meantime let them take to heart the oft-repeated advice, renewed again in very vigorous terms, as quoted in our last number, by Lord Coleridge, to increase the facilities for the taking of tickets and otherwise to the travelling public, and the latter would have less ground for complaint when they found themselves in situations like those of Sir Robert Menzies and Mr. Watson.

NOTES IN THE INNER HOUSE.

IN *Stewart v. Ledingham* (First Division, July 9) we have a decision of some importance to agricultural tenants, and one which should be welcomed by the opponents of the law of hypothec, as it tends to illustrate the hardships which that law entails.

The pursuer (the well-known litigant, Mr. Stewart of Auchlunkart) presented a petition in the Sheriff Court of Banffshire, praying for the sequestration of the cattle belonging to a tenant, and also to sub-tenants. The fifth section of the Act of 1867 was founded upon, which renders the cattle of others grazing upon a tenant's farm subject to his landlord's hypothec to the extent of the amount received by the tenant for such grazing. In this case the grazing or sub-tenants had consigned the amount of their rents, but pleaded that the pursuer was bound to secure them by assignation or otherwise in his right of hypothec before uplifting the sums consigned. They maintained that they were in the position of sureties paying for a debtor, and entitled by a well-known legal principle to demand an assignation of the creditor's right. The sub-tenants had, it seemed, already granted bills to the tenant for the rent payable to him. In the Sheriff Court their plea was successful, but in the Court of Session the pursuer prevailed. It seems indeed to have been admitted that unless the landlord can show that he would be prejudiced by doing so, he is bound in equity to grant such an assignation as was sought in this case. But here the tenant was in

arrear, and the landlord entitled to exercise his hypothec for a second half-year still to be paid, so it was held he would be prejudiced by doing what was demanded by the defenders.

The Lord President raises the question (which he characterizes as one of a somewhat delicate nature), whether, "if a sub-tenant chooses to pay his rent before it is due, and has been made to pay it twice over, he can demand from the landlord an assignation such as this." And he indicates a strong opinion against such a demand, upon this ground, that the tenant has placed himself in this position by his own imprudence, knowing the risk which under the statute he ran.

The case of *Fairbairn v. Miller* (First Division, July 12) was an action of reduction and damages brought by a party against whom a warrant had been granted by the Sheriff of Edinburgh for ejection from a shop, because he had failed to obtemper a previous order of the Court, made at the instance of a bankrupt's trustee, by delivering up certain keys and documents. The application for this order had not been intimated to or served upon the pursuer, and this was one of the grounds upon which he sought redress. This ground was successful. The Lord President said, "It appears that this petition was never served on the pursuer. Not only was there no citation, but there was no intimation of any kind given to him." After pointing out that the pursuer was in possession of the shop, and that a warrant for his removal was necessary unless he went voluntarily, he proceeded: "Now, that being the state of the case, is this a legal warrant? For my part I can hardly see on what grounds any one can attempt to support it. Reference was made to the Bankruptcy Act, 1856, section 16, but that section certainly recognises nothing whatever of the kind. It is not applicable in any way to an application like the present by a judicial factor. I looked with some anxiety at the Sheriff Court Act of 1876, to see whether any justification of such a course could be found there (for very great changes were made by that Act), but I found nothing approaching to an action of a proceeding like this, and therefore no benefit can be taken from that Act."

Horn v. Horn (Second Division, July 13) raises a point of interest relating to the question of reparation for injuries. The Court, although not unanimously, decided in this case that a father who had suffered loss by the death of his son, caused by a railway accident, was entitled to sue the company who had issued the ticket for that journey to the deceased, although the accident did not occur upon their line. It could not be doubted by any of the Judges that if this had been an action at the instance of a person injured by an accident, he would have been entitled to bring it against the company who issued the ticket to him, and thus contracted with him. But Lord Ormidale was of opinion that the fact of the action being brought by a relative of the sufferer altered the case. According to his Lordship, the action could not arise *ex contractu*, as the

pursuer had no contract with the defenders—that he could not therefore found upon the delict arising out of the execution of the contract between his son and the defenders; while, on the other hand, if he sought damages for the injury done to himself and the loss sustained, he could only go against the wrong-doers, viz. the company upon whose line the accident had occurred. A clear distinction was thus, in his opinion, to be maintained between actions at the instance of sufferers themselves and those brought by their relatives, the legal principles being entirely different. In the opinion, however, of Lord Gifford, this view is fallacious. He can see no distinction beyond this, that “if the person survives the damages must be paid to himself, while if he is killed the damages can only be paid to his relatives, according to law.” For, according to him, an action by a passenger for injuries is not to be looked upon as arising solely upon contract. “It is an action essentially on fault or neglect, although on fault or neglect arising out of a contract.” And this is substantially the view of the Lord Justice-Clerk also, who makes some observations upon the peculiar nature of such actions at the instance of parents for the loss of children, or *vice versa*. “The title of the father,” he says, “is a corollary or adjunct to the primary right of the deceased, and although differing in its incidents, has and must have the same foundation.”

It was contended that the law of the place of performance must prevail, and that the contract was to take the deceased to London. According, however, to the Lord Justice-Clerk, there is in such a contract no place of performance by the law of which the contract could be regulated. “Is the place of performance London? Clearly not. The execution of the contract was to be completed there, but the contract was to be executed during the whole course of the journey over the line. The law of one place was not considered more than another.”

Upon the question of damages also the company failed. The jury awarded £550 as pecuniary loss, and £150 as solatium. The deceased was earning at the time £150 in his father's employment, and about to enter into a partnership with his father, the profits of whose business were estimated at £700 a year.

NAMES.

(From the “Albany Law Journal.”)

THE question, “What's in a name?” is sometimes asked. Youthful parties, when called upon for the first time to give suitable designations to small but active pieces of humanity, are often at a loss what to say. To the propounders of the above query, and to those who have the weighty duty referred to placed upon them, I especially dedicate this article as a dog-days' meditation.

The law supposes every one to be designated and known by two names, one enjoyed by him in common with the other members of his family, be it Jones, Smith, or Robinson; the other his exclusive property, and given him at his baptism, be it Tom, Dick, or Harry (*Frank v. Leir*, 5 Robt. (N.Y.) 599). The days when it was sufficient for a man to be called Husy, Busy, or Moses, have been left behind in the onward march of time; and, on the other hand, the exertions of the Puritans in bestowing such names upon their children as "Job-rackt-out-of-the-ashes," and "If-God-had-not-died-for-thee-thou-wouldst-have-been-damned Dobson," and of the lordly aristocrats of the Old World, in decorating their hopeful scions at their baptisms with such word-chains as "John George Henry Douglas Sutherland Campbell," would be entirely thrown away were the infants laden with such appellations grievous to be borne residents within the empire shaded by the star-spangled banner; for the law as administered in America panders not to the pride of those who would thus stigmatize their children, but, with Republican simplicity, knows of one, and only one, Christian name; it treats the insertion or omission of a middle name with the same indifference that a Liberian mammoth would a fly crawling upon its pachydermatous hide (*Edmondson v. State*, 17 Ala. 179; *Thompson v. Lee*, 12 Ill. 242; *Hendershott v. Thompson*, 1 Morr. (Iowa) 186; *State v. Martin*, 10 Mo. 391; *Hart v. Lindsay*, 17 N. H. 235; *Kings v. Hutchins*, 28 id. 561; *Dells v. Kinney*, 15 N. J. L. 130; *Allen v. Taylor*, 26 Vt. 599). If inserted in the most formal document, the law rejects it as surplusage (*Choen v. State*, 52 Ind. 347), and with supreme unconcern suffers a woman called in a deed Margaret A. Gettings to subscribe her name as Margaret S. Gettings (*Erskine v. Davis*, 25 Ill. 251).

It will be well for godfathers and godmothers, and such like people, to bear in mind that a name is the word by which a person is to be known or distinguished, and that to be of much use it should be such as will indicate the sex of the owner thereof. This was forcibly impressed upon somebody's mind by the Circuit Court of the District of Columbia some years ago in this manner: An individual of colour held in bondage presented to the Court a petition praying to be granted his or her (the gender of the pronoun we should use is unknown to us) freedom. The person who flattered himself that he was the owner of this valuable child of Ham opposed the prayer of the petition on the ground that the petitioner had been lawfully imported under an act of the State of Maryland (ch. 67 of 1796). This statute required that a list of all imports of this kind should be prepared, specifying the sex of each. On the list the coloured individual in question figured under the name of "Jo,"—only this and nothing more. Thereupon the Court decided that the list did not properly designate Jo's sex, so that (not knowing more than the judges, we must repeat the name) Jo was entitled to (again we cannot avail ourselves of a pronoun) Jo's freedom (*Crawford v. Slye*, 4 Cranch's Ct. Ct. 457).

One would think that the name "Jo" would be the height of brevity, but lawyers learn from their interesting books that it has been surpassed,—that on one occasion Lord Campbell remarked that he had been informed by a person of most credible authority that within his own knowledge an individual had been baptized by the name of T (*Reg. v. Dale*, 15 Jur. 657; 5 E. L. & E. 360). What would one expect after T? Surely no name can be shorter! Yes, indeed! We read in a book called 6 Manning, Granger & Scott's Reports, Mr. Corrie, while arguing learnedly in a case, used these words: "Mr. Unthank says he knows a person who was christened I" (*Kinnersley v. Knott*).

While thus we have it on good authority that I and T have been used as *bona fide* Christian names, we are told, on the other hand, that W certainly cannot be a name of baptism (*Nash v. Calder*, 5 M. G. & S. 177). Mr. William Henry W. Calder was the gentleman who drew forth this decision from the Court.

Severe has been the conflict waged over the question of the legality or illegality of these one-letter names. Equal justice has not been meted out to all the alphabet alike; favours have been showered on some letters that have been denied to others; A and its associates have been assigned posts of honour from which B and his clan have by many been excluded, and the dignity of forming Christian names by themselves has been conceded to the vowels by all, while many have refused that distinction to the more numerous but the less-able-to-assist-themselves consonants.

In an English case it was decided that a vowel, which (as the Court said) is in itself a word, and may be pronounced by itself, may be a name, though a consonant, which is incapable of being sounded without the addition of a vowel, cannot (*Lomax v. Tandels*, 6 M. G. & S. 577). This decision arose out of a discussion over the name of Mr. I. Shakespeare Williams. Judge Coltman said that "I" might be a Christian name; while Maule, J., remarked that he thought they were at liberty to assume that the man's true Christian name was "I Shakespeare."

In a subsequent case, however, Lord Campbell, when an objection was made to a recognizance taken before Lee B. Townshend, Esq., and I. H. Harper, Esq., that only the initials of the Christian names of the justices were mentioned, remarked: "I do not know that these are initials; I do not know that they (the justices) were not baptized with those names; and I must say that I cannot acquiesce in the distinction that was made in *Lomax v. Tandels* that a vowel may be a name but a consonant cannot. I allow that a vowel may be a Christian name, and why may not a consonant? Why might not the parents, for a reason good or bad, say that their child should be baptized by the name of B, C, D, F, or H? I am just informed by a person of most credible authority that within his own knowledge a person has been baptized by the name of T." And in this opinion of the chief, Justices Patterson, Wight-

man, and Erle concurred (*Reg. v. Dale*, 15 Jur. 657; 5 E. L. & E. 360).

The point was discussed with considerable learning and humour in the case of *Kinnersley v. Knott*, 7 C. B. 980. There Mr. Serjeant Talfourd contended earnestly that a defendant called "John M. Knott" was not legally and properly designated, saying that the letter M, standing by itself, could not be pronounced, and meant nothing, but that in this connection it meant something, and that that something ought to be stated, for the law forbade the use of initials in pleadings. He asked the Court if they would not most assuredly hold a pleading to be bad if a man of the name of John Robbins was described by the name of "John" and the figures of a couple of red-breasts? (The Court did not deign to answer the query.) The learned Serjeant insisted that the declaration in question should be held bad, because it either put a sign for one of the defendant's names or described it by the initial letter. A consonant, he urged, by itself is a mere sound without meaning; the letter H, indeed, by the custom of London and some other places, had no sound at all, though elsewhere it often protruded itself on all occasions; but Mr. Robinson, in reply, admitted that every Englishman had a right to be called by every name given him at his baptism (here Mr. Justice Maule remarked that he once knew a Sheriff named John Wanly Sawbridge Erle Drax), but in this case he submitted it was not shown that the right had been invaded. He said he knew of a bank director christened Edmond R. Robinson; that even if letters did not stand for names in England, Jews, Turks, or heathens might use such short names. How, he asked, are such designations as M'Donald, M'Taggart, D'Harcourt, D'Horse, to be set out in pleadings? But the Court was against admitting M to be a name. Justice Maule remarked that vowels might be names, and that in Sully's *Memoirs* a Monsieur D'O is spoken of, but that consonants could not be so alone, as they require in pronunciation the aid of vowels, and the Chief Justice said that the Courts had decided that they would not assume that a consonant expresses a name, but that it stood for an initial only, and that the insertion of an initial instead of a name was a ground of demurrer. (This last point is now varied by statute.)—*Pittsburgh Law Journal*, August 1876.

So much for the view taken in England concerning the poor consonants. They have had warm advocates on this side of the water. In *Tweedy v. Jarvis*, 27 Conn. 62, the defender pleaded in abatement the non-joinder of Mr. Hickock. The plaintiff replied that the plea was insufficient, as the Christian name of that individual was not given, but he was designated as J. W. Hickock only. In deciding this knotty point, Storrs, C.-J., discussed the question elaborately. We will quote some of his words: "While it is well settled," he remarked, "in the books that a letter of the alphabet, which is a vowel, may be the name of a person, there is a con-

trariety in the cases on the question whether one of those letters, which is a consonant, can constitute a name, for the reason that a consonant, unlike a vowel (which is a simple and perfect sound by itself), is a letter which cannot be sounded, or can, at most, but be imperfectly sounded by itself, and represents only a compound sound, the expression of which by the voice requires its connection with a vowel, and, therefore, that a consonant, not being able to be pronounced by force of its own character, so to speak, must be spelled out in writing by its being conjoined with a vowel in order that a perfect sound may be produced. It is said that A, being a perfect and simple sound, may be a name, but that B being a consonant, and producing no sound, unless it be spelled with a vowel which shall represent, and in the pronunciation of the two conjointly produce some sound, cannot (*Miller v. Hoy*, 2 Ex. 14; *Nash v. Calder*, *supra*; *Reg. v. Dale*, *supra*). If we should adopt the distinction made in some of these cases between a vowel and a consonant, and should further be of the opinion that the letter J, by which the Christian name of Mr. Hickock is designated, is to be deemed a consonant, the result would of course be that that letter could not constitute any name, and therefore that the plea is defective. Whether, however, that letter should, as used in the plea, be considered a vowel or a consonant, might still give rise to debate, as that letter is only another form of I, which we are told by lexicographers is, in England, both a vowel and a consonant. We should, however, probably have no difficulty in pronouncing it to be a consonant, as it is only when used as such that I is changed to that particular form. But as applicable to the present subject we see no sensible or rational ground for any distinction between a vowel and a consonant, and think that either of them may be a name, and that name is denoted by the sound by which it is called or pronounced when it is spoken or uttered audibly as a letter. 'Letters,' as said by Judge Evans (5 Rich. 328), 'are the representatives of sounds,' and with him we are wholly unable to see any reason why a simple sound may be represented by a letter, but a compound sound may not. The one conveys as clear an idea to the mind as the other. According to the common mode of speech, a consonant, when it is used alone, standing by itself, is pronounced by the name of the letter, unless it is used as standing for some other word, and when it is used to designate a particular person, as it frequently is, the name of the letter is given to him."

In Pierce's interesting memoir of Charles Sumner, we are told that in that illustrious statesman's first case, the defence of one Alissandro Gherardin, one of the chief points was that the surname ended with an *n*, instead of an *r*, as written in the indictment.

We are informed by Mr. V.-C. Malins that *Thomas* and *Tom* are only different forms of the same name (L. R. 7 Ch. D. 198). As long ago as the days of Guy Fawkes, it was decided that *Piers* and

Peter, Saunders and Alexander, Jane and Joan, Jean and John, Garret, Gerat, and Gerrald, are the same names, but *Ralph and Randall, Randolphus and Randolphus, Sibel and Isabella*, are distinct (2 Roll. Abr. 155). In Illinois, *May* and *Mary* are held to be different names (*Kennedy v. Merrian*, 70 Ill. 228). So are *Bart* and *Bartholomew* (29 Ill. 508), and *Henry* and *Harry* (21 id. 535).

If a man writes the letters "Jr." after his name, they are not considered as forming any part of it (*Headly v. Shaw*, 39 Ill. 356; *State v. Grant*, 21 Me. 171; *State v. Wear*, 38 N. H. 314; *People v. Cook*, 14 Barb. 259). But where two persons possess the same name, when the name is used it will be presumed that the elder one is the one meant; but of course the presumption may be rebutted by evidence that it was intended otherwise (*Bate v. Burr*, 4 Harr. (Del.) 130; *Brown v. Benight*, 3 Blackf. (Ind.) 39).

Every one must have two names, one that of his family, the other his baptismal one. Old Bacon says that it is repugnant to the rules of the Christian religion that there should be a Christian without a name of baptism (Bacon's Abr. vol. iv. p. 752). If either name is unknown, the law allows one to be designated by two fictitious cognomens in legal proceedings in the State of New York (*Frank v. Lewis*, 5 Robt. (N. Y.) 599).

In the good old days of yore, though a person could not have two Christian names at one and the same time, that is, could not be called John or James, yet he could, according to the rules of the Church of England, receive one name at his baptism and another when he was confirmed; for no one was forced to abide by the name given him by his godfather and godmother when he came himself to make a public profession of his religion. But he did not by taking the new name lose the old one (Bacon's Abr. vol. iv. p. 753).

On one occasion a man sued as "Jonathan otherwise John" demurred to being so called, but Lord Ellenborough refused to interfere, as he said that for all that appeared to him, "Jonathen otherwise John" might be all one Christian name, and he would not contend that it was not; that names as fanciful as "otherwise" frequently occurred (*Scott v. Soans*, 3 East. 111). The Courts will not suppose that "Mr." before a man's name is his Christian name, although Mr. Hugh Hitt once tried hard to persuade them to do so (*Gatty v. Field*, 9 Ad. & E. (N. S.) 631).

Men generally assume and keep the name of their parents (women get rid of it as soon as possible); but doing so is purely optional and a matter of civility to the authors of their being. Family names are not copyrighted, nor are they trademarks which a person can be punished for infringing. Old Jones's son is not bound to continue to be a Jones all the days of his life, nor can anything be done to him if he takes to himself the name of Smith or Robinson, and any contract or obligation entered into by or with young Smith or Robinson (*ne Jones*), in his newly-acquired name, or any grant or

devise to him, is as binding and effectual to all intents and purposes, anything supposed to the contrary notwithstanding, as if in the contract, obligation, deed, or devise, he had been called by the name of his *pater-familias*. The Court said this when Mr. Snooks applied for leave to change his patronymic (why Mr. S. should have been dissatisfied with his surname we cannot see; it is uncommon good old Saxon, and merely a contraction for the dignified name of Seven Oaks, a town in Kent, England). Under the New York law (chap. 464, of 1847) a judge of the Court of Common Pleas may authorize a change of name when he is satisfied that the applicant for the change will derive thereby a pecuniary benefit; the mere possibility or probability of such a benefit accruing is not sufficient; it must be as clear as daylight to the judge that such benefit will result (*Petition of Snook*, 2 Hilt. (N. Y.) 566).

In England, as Lord Chief-Justice Tindal laid down (*Danes v. Lowndes*, 1 Bingh. N. C. 618), there is no necessity for any application for a royal sign-manual to change a name. Although that is a mode which persons often have recourse to because it gives a greater sanction to it, and makes it more notorious, still a man may, if he pleases, and it is not for any fraudulent purpose, take another name and work his way in the world with his new name as well as he can. Nor is there any necessity for any legal steps whatever.

As a final remark we would say, that some names, although differing to the eye, are considered, for all practical purposes, the same, being to the ears of the judge deciding the matter identical in sound, for instance, Chambles and Chambless, *Ward v. State*, 28 Ala. 53; Conly and Conolly, *Fletcher v. Conly*, 2 Greene (Iowa), 88; Usrey and Userry, *Gresham v. Walker*, 10 Ala. 370; Rae and Wray, *Vance v. Wray*, 3 U. C. L. J. 69. But the auricular appendages of learned occupants of the Bench have discovered a difference in the sound-waves produced by pronouncing the words, Comyns and Cummins, *Cruickshank v. Comyns*, 24 Ill. 602; Jeffery and Jeffries, *Marshall v. Jeffries*, 1 Humph. 299; Jacques and Jakes, *Jacques v. Nichols*, T. T. 3 & 4 Vict. (Ont.); and Owen and Orrin, *Ferry v. Mathews*, T. T. 5 & 6 id., and so have held them not to be identical.

BUILDING RESTRICTIONS.

THE recent decision of the First Division in *Dalrymple v. Herdman* (June 5, 1878, 15 So. L. R. 588), reversing the judgment of Lord Curriehill, requires careful consideration. It may be doubted whether in the enforcement of building restrictions between vassals of the same superior the Court have not left behind them the contract—the express or implied intention of parties—and are not now proceeding upon some principle of good-neighbourhood or urban

police which has not as yet been very definitely stated. In *Dalrymple v. Herdman* a piece of ground extending to more than an acre was feued out to Forbes, a builder, who, along with his disponees, was taken bound to erect within a certain time thirteen dwelling-houses of carefully specified dimensions. With the exception of the thirteenth stance, which might be used as a shop, it was provided that Forbes and his disponees should not be entitled to convert the houses into shops or warehouses for the sale of goods or merchandise, or into working or manufacturing houses of any kind, or to use the houses for such purposes or for stables, or for any purpose which might be injurious or disagreeable to the feuars on the superior's estate. It was again declared that the houses should be used as dwelling-houses only. In the event of a contravention the superior stipulated for a duplicand of the annual feu-duty as pactional feu-duty, not penalty, while the contravention lasted, with an option to the superior to forfeit the feu on contravention. These conditions were appointed to enter the titles of the subjects. Subinfeudation was prohibited. Forbes, being infest, disposed nine out of the thirteen stances separately to Dalrymple and the other complainers in *Dalrymple v. Herdman*, and these persons built their dwelling-houses within the time and in the manner specified by the original feu-contract, the whole conditions of which were of course applied to the separate parcels disposed by Forbes. Subsequently, however, to the infestment of the complainers, duly confirmed by the superior, Forbes disposed the remaining four stances to Herdman and the other respondent in *Dalrymple v. Herdman*, who proceeded to use part of the ground as a sculptor-work, and to erect a shed or office for the same purpose. The disposition by Forbes to Herdman recited that it had been agreed to discharge the subject conveyed of the whole conditions in the original feu-contract, and the superior accordingly joined in the deed for the purpose of making this discharge. In these circumstances Lord Curriehill, whose opinions on conveyancing questions are always expressed with great clearness, and are entitled to great respect, refused an interdict against the erection of the shed and the use of the stance as a sculptor's yard. His Lordship held that the clause relating to contraventions made it competent for the superior and any feuar to transact as to the terms on which a contravention should be sanctioned, and that the parties had therefore contracted themselves out of the rule of *jus quæsitum tertio*, or mutuality of right and obligation, on which the cases of Gould, McGibbon, and Alexander were decided. This judgment has now been overturned by the First Division, and interdict granted on the ground stated by the Lord President in *Robertson v. N. B. Railway Company*, July 18, 1874, 1 Rettie 1221, that "when a superior feus out his lands for building purposes, and lays all his feuars under the same obligations, there arises a mutuality of obligation among the feuars which depends on the community of their relation to the superior. If all

are bound to the superior, then the general rule undoubtedly is that they have rights *inter se* whereby they are enabled to enforce the common obligations against one another." There is, indeed, in the opinion of Lord Deas a trace of a totally distinct ground of judgment, viz. that the feuars erected houses on the faith of the mutual rights conferred on them by their feudalized and confirmed titles. But the principle of decision is undoubtedly that stated by Lord Mure, that "from the imposition of the restriction on the whole subject there arises an implied right in each vassal to protect himself. . . . The disponees were entitled to think that the whole ground would be built upon in accordance with the plan which the restrictions and conditions were meant to carry out." We should like, however, to have had it a little more clearly explained why the disponees were entitled not only to think so, but to insist on the restriction being enforced. They must have thought so either from the titles, or from the actings of the superior, or from the known state of the law applicable to feu-contracts for building purposes. Nobody can doubt that it was very desirable, both for the feuars themselves, and also perhaps on public grounds for the sake of having a neatly finished street, that the restriction should be enforced. As Lord Shand observed, "the restriction was evidently intended for the benefit not only of the whole subject, but of each separate part of it, and so each individual feu was interested in the restriction." But it is not every beneficial restriction that a co-vassal can enforce, although beneficial interest would in every case be required as a title to enforce. What appeared in the feu-contract was a restriction imposed by the superior on the use by the vassal of the ground. Of course this restriction might have been removed by the agreement of the original vassal and the superior. But the superior clearly intended that if the original vassal parted with the property in parcels, that each parcel should be bound by the condition which was to enter the title. This was merely providing that the restriction should not be rendered ineffectual by the parcelling of the property. So far we have reached no obligation on the superior, but only two obligations on the vassal. If the disponee of the original vassal comes in his place, why may the superior not discharge the portion of the subject disposed? Suppose only one stance to have been disposed by the original vassal, and before houses were erected on any part of the feu the superior and the disponee agree upon a discharge. Would this be incompetent? Again, suppose that in the same case the original vassal, holding twelve of the thirteen stances, agrees with the superior for a discharge of the condition. Owing to a change of market, it might be ruinous to build in terms of the original contract. Would the disponee of the thirteenth stance be entitled to insist that his house, when he built it, should be one of a row of thirteen? The superior might have changed his views regarding the most suitable style of architecture. Would the soli-

tary disponee be entitled to insist on adherence to the original plan, even if his house had been built for him before he purchased the stance? The superior does not bind himself not to alter his plans. If the feus had been given off separately according to an estate feuing-plan which was referred to in each feu-contract, would the superior be bound not to make any modification on that plan which might embrace an entire estate? Again, if two large feus were given off to separate builders with the view of constructing two streets facing each other, would the disponees under the first contract have any right to object to alterations on the plans under the second, even if these alterations, not amounting to nuisance at common law, entirely sacrificed the amenity of their houses? Or, to come back to *Dalrymple v. Herdman*, can the rights of the disponees depend on their number, on their being in a majority against the wishes of the superior? Not only, then, did the contract impose no disability on the superior, but it carefully provided for the rights of the superior in case of contravention. Lord Deas observed that this clause gave no right to the vassal to contravene on payment of a duplicand. This is obvious enough, for the superior has the option of forfeiture. But is it not an agreement by the vassal to pay a duplicand in consideration of being permitted to contravene, and was this agreement not patent in the title and on the record to all the disponees? No doubt the object of the agreement is to enforce the original restrictions, but it is none the less an agreement because it is a harsh one. Lord Deas, indeed, goes the length of saying that if the superior had taken back the feu upon contravention, in terms of the option to that effect reserved, the superior would still be bound by the restriction. This is probably involved in the judgment *Dalrymple v. Herdman*, and it illustrates the extent to which implied contract can be carried, for on this view the superior's power to take back the feu must have been inserted solely in the interests of his non-contravening feuars. If the written contract of parties discloses no obligation on the superior, none can be inferred from his conduct. He confirms dispositions because he cannot help it, and he permits buildings to be erected because he cannot object to them. It must, then, have been some rule of the common law on which the disponees were relying. What is the state of the authorities?

In *Gould v. McCorquodale* (Nov. 24, 1869, 8 Macph. 165) the original owner possessed land on both sides of a projected street, and in the separate dispositions which he gave off, north and south of the street, he inserted a declaration that no houses higher than thirty-two feet should be erected within fifty feet of the north side. This was obviously a burden on the northern stances, and a privilege or servitude in favour of the southern stances. It was appointed to be inserted in all the titles. The disponee of an original disponee on the south side, although he had permitted the restriction to be disregarded along the greater part of the north side of the street,

was nevertheless found entitled to object to houses in contravention of the original condition being erected directly opposite his own house, where his interest was greatest. It will be seen this was not a case of a restriction in the title to property B being enforced by the owner of property A. The restriction on B was contained in the title to A as well. So clear was this that the Lord President said: "It is unnecessary therefore to ask whether, if this restriction had not entered the title of the respondent's author" (northern property), "but had been confined to the advocator's title" (southern property), "it would have been enforceable against the respondents. There is much to be said for that, but it belongs to a branch of law in which there are many nice and subtle distinctions. It was to avoid such questions that James Oswald in 1830 took care to repeat in the title of the servient tenement the restriction already inserted in the title of the dominant tenement, and I think he did effectually create a servitude *altius non tollendi*." His Lordship then discusses the question to what extent, whether along a whole street or not, the Court would be inclined to enforce even an express restriction of this kind. Lord Deas observed: "The case is altogether different from cases in which questions arise between a superior and his vassal whom he has laid under certain restrictions, or between feuars holding under the same superior with restrictive clauses in the titles of each, but with no express right or title conferred on the one feuar to enforce the restrictions against another." In Gould's case, therefore, an express obligation had been undertaken by the owner of burgage property.

In *M'Neill v. Mackenzie* (Feb. 5, 1870, 8 Macph. 520) there were several peculiarities. The restriction sought to be enforced was this: "Further, that the roof and chimney-heads of the said dwelling-house shall remain in the same form, height, and construction as they are at present without any alteration whatever, at least that no alteration shall be made thereupon which shall disfigure the appearance of the street either to the front or back parts, or be in any respect an annoyance or offence to the proprietors or occupants of any of the houses in the said street." The question of the right of the superior to enforce or to discharge such a restriction did not occur, because the restriction was not contained in the original feucharter, but only in the charters by progress. It was imposed by the original vassal in selling the various portions of his feu. The disposition before the Court in *Mackenzie v. M'Neill* contained the following clause: "Hereby it is provided and declared that the above restrictions, etc., shall be inserted in all the dispositions to be granted by me to any purchasers of the other houses in Hill Street; and with regard to such houses as shall remain with myself unsold, I bind and oblige myself to be subject to the same restrictions, etc., as are above inserted, it being my intention that I and the whole other proprietors of houses shall be laid under similar restrictions." It is unnecessary to comment on this decision. The right to object

to an alteration of height was admitted. It was founded on the clearest words of obligation.

In *M'Gibbon v. Rankin* (Jan. 19, 1871, 9 Macph. 423) the question arose between two feuars who occupied contiguous houses on the same side of the street, built on separate feus which had been successively derived from the same author. The restriction imposed was against "erecting any dwelling-house or offices, or houses of any kind, exceeding fifteen feet high on the back-ground of the said steading;" and in the earliest of the feu-dispositions the common author or superior bound himself to insert similar conditions in all future dispositions and infeftments of other parts of the street. The arguments *hinc inde* are perfectly obvious and perfectly distinct from those which could be urged in *Dalrymple v. Herdman*. Lord Ardmillan said in *M'Gibbon's* case, "I think it highly probable that the first feuar would not have acceded to the restriction unless it had been protected by the obligation that the same restriction should be imposed on the coterminous owner;" and in giving judgment he accordingly explains that this obligation to insert and the actual insertion of the condition in the titles of both parties created an implied contract which each was entitled to enforce. It was the common interest, *plus* the obligation on the superior, which on one view created a *jus quasitum tertio*, without any express declaration that third parties having interest should be entitled to enforce the stipulation. The obligation was not merely on the superior, but conceived in favour of every feuar, including the complainer; and therefore it is probably more accurate to say with Lord Deas, that the case was one not of *jus quasitum tertio*, but of mutual contract, although the Lord President doubted whether the complaining feuar could be represented as the assignee of the superior in the obligation originally imposed or as his singular successor in a real servitude. Even this result was not reached without difficulty. Lord Deas points out that where a right to enforce is not expressly given to the adjoining proprietor, it must be matter of the clearest inference, and he apparently repudiates the doctrine laid down by Lord President Hope in *Cockburn v. Wallace* (July 1, 1825, 3 Sh. 129), which was certainly dissented from by Lord Gillies, but which appears to have been based less on the principles of contract than on those of real servitude *altius non tollendi*. There was also in that case a difference of opinion on the Bench as to whether the feuars were entitled to found on an antecedent contract with the superiors which alone contained an express obligation relating to the matter in dispute. And what is chiefly of importance in criticising the judgment in *Dalrymple v. Herdman*, we find Lord Deas guarding himself against the supposition that a right to enforce might be inferred from the mere insertion of a similar restriction in the titles of each feuar. The same point arose in the case of *Alexander v. Stobo* (March 3, 1871, 9 Macph. 599), a case of which the importance and difficulty were

much overrated, probably on account of the large interests involved. The restriction there was that no building facing a street should exceed four square stories in height; and the decree of the Court mentions that, not only was this condition appointed to enter the title, but the superior bound himself to limit or restrict the feuars or purchasers of the adjoining land to erect buildings of a similar height. The question, however, did not arise with the superior at all. He had disposed two large parcels to Stobo, a builder. Stobo laid the restriction, which the superior had imposed on him as regards both parcels, effectually on his own feuars or disponees in one parcel of the ground, but not, at least expressly, on those in the other parcel, in which the operations challenged were taking place. And, in the rights granted to feuars or disponees in the first parcel, Stobo did not undertake expressly any obligation whatever as regards the matter in dispute; but he was under an obligation to his own superior which he was not in a position to get discharged. The parallel case in *Dalrymple v. Herdman* would have been if Forbes had discharged at his own hand. This would obviously have been worthless; and, in like manner, in *Alexander v. Stobo*, although the lengthy judgment of the Court (dissented from by Lord Deas) does not seem to proceed on that ground, but on the necessity of keeping the streets of Glasgow in conformity with a plan, the Court could not have permitted Stobo to deny his own obligation. With reference to a passage in the opinion of the same Judge in *Dalrymple's* case it is interesting to notice that in *Alexander v. Stobo* Lord Deas observed: "If Stobo had forfeited the estate to Kerr the superior, or had resigned *ad remanentiam* in Kerr's favour, and so evacuated any obligations he had undertaken to him by the feu-contract, I fail to see that the pursuers" (the disponees of another parcel from the same author) "could have shown any sufficient title to interfere or to prevent Kerr the superior from making what use of the ground so forfeited or resigned he thought proper." It may be added that the notion that the implied right of a feuar to enforce a restriction rests on the mutuality of obligation between the feuars was destroyed by the decision of the First Division in the case of *Robertson v. N. B. Railway Company*, July 18, 1876, 1 *Rettie*, 1213. In this case, in spite of the remonstrances of the Lord President, the Division held that an obligation against the collection of manure which had been effectually imposed on one part of a feu might be vindicated by a singular successor in another portion of the original feu, who was not bound by the restriction, because it had not entered the infeftments. The *common* interest in that case was of a slender character, though the obligation, being one against nuisance, was of an important kind. The premises were not feued out for a street, or subject to any general building regulations to secure uniformity. They were merely in a city, and in close vicinity.

In the foregoing remarks we have not ventured to dispute the

good sense and practical convenience of the decisions of the Court on this branch of the law. But the Judges ought to give clear and definite principles as well as satisfactory results, and we have endeavoured to illustrate the difficulties and uncertainties which weaken the authorities cited. Are building restrictions to be decided by the law of express contract, or of contract implied from the language of parties, or in deference to some view of public advantage, or do they rest on the law of real property and servitudes? Do they imply mutuality of obligation, are they confined to the relation of superior and vassal, or is mere neighbourhood sufficient to call them into existence?

Correspondence.

(To the Editor of the Journal of Jurisprudence.)

SIR,—It is a matter of regret to many in the legal profession that a new edition of that excellent work, “Menzies’ Lectures on Conveyancing,” is not published, bringing the work up to the present time. It is unnecessary here to speak of the merits of this work, which is perhaps unrivalled in Scottish legal literature for its comprehensive grasp of the subject and for its great lucidity. To let such a work go out of print is not at all to the credit of the profession.—I am yours,
A. T.

EDINBURGH, 16th August 1878.

NEW ZEALAND DEEDS.

SIR,—Difficulties frequently arise, and serious injustice often takes place, through the execution of deeds signed in Scotland being imperfectly verified. Many of the practitioners there apparently consider a notarial certificate alone sufficient evidence.

An Act in force here requires “that every will or codicil, deed or instrument in writing, executed beyond the limits of the colony, whereof the execution shall have been verified as by the said Act of Parliament (5 & 6 Will. IV. c. 62) required, shall be received in evidence in every court of justice in the colony.” The attesting witness, or one of the attesting witnesses, should make a statutory declaration of the execution of the deed before a notary public, or some other of the persons for this purpose mentioned in the Act of Will. IV. (*vide* section 16), who should thereupon give the usual notarial certificate of the character and credibility of the declarant. The limited effect of a notarial certificate alone is fully discussed in the case of *Nye v. Macdonald* (L. R. 3 P. C. 331).

These observations apply to deeds generally intended to be used in the colony, but there is a class of instruments, partly printed, relating to lands, the titles to which are held under a special statute called "The Land Transfer Act, 1870," by which it is provided that instruments executed pursuant to its provisions, "if attested by one witness, shall be held to be duly attested, and the execution thereof may be proved, if the said parties be resident in the United Kingdom of Great Britain and Ireland, then before the mayor or other chief officer of any corporation, or before a notary public."

In every case the address and occupation of an attesting witness should be added by him after his signature.

WILLIAM DOWNIE STEWART.

DUNEDIN, 17th July 1878.

Obituary.

GEORGE BURN, Esq., W.S. (1864), died on the 20th September. Formerly a partner in the firm of Wilson, Burn, & Gloag, W.S., he for some years had been engaged in business on his own account. He was well known in Edinburgh in legal circles, where the geniality of his disposition secured to him numerous friends.

JAMES DAVID DICKSON, Esq., Advocate.—It is with the deepest regret that we hear, as we are going to press, of the death of the above gentleman. A universal favourite among his contemporaries at the Bar, his loss will be keenly felt by a large circle of friends. A more detailed notice will be given in our next.

The Month.

Association for the Reform and Codification of the Law of Nations. The sixth annual conference of this Society was held lately at Frankfort. An address was given, amongst others, by the Japanese ambassador to England, and a communication was also read from the Chinese ambassador. Among the subjects discussed we may mention the following: Collisions on the High Seas (which formed the subject of a paper by Sir Travers Twiss); General Average; Bills of Exchange; International Copyright; The Right of War Indemnity; Capture of Private Property at Sea; Mercantile Custom as a Cause of Law, etc. etc. The conference seems in every way to have been a highly interesting one, and many valuable papers were read. The following is the report of the English Central Committee on the York-Antwerp Rules of General Average:

"The opinion that it is not only desirable but practicable to establish a uniform system of general average for all maritime countries has been steadily gaining ground since the year 1860.

"That uniformity in this matter, if practicable, is desirable, needs no proof.

A uniform system would or might be understood by all parties ; whereas now, when the average is adjusted abroad, it frequently happens that none of the parties really interested, that is to say, neither the shipowner nor the underwriters on ship or cargo, have the least knowledge of the law or custom by which the settlement between them is regulated. A uniform system would, in the case of ships calling at ports for orders, do away with the temptation to let the choice of a final port be affected by considerations of the rules of adjusting which may prevail in one country or the other. Were there one uniform system, the general average could always be adjusted at the cheapest and most convenient place. The consequent saving of incidental expenses, and the diminution of errors and loss to one party or the other, resulting from imperfect knowledge, would, it is believed, be considerable.

"A series of international conferences having this object in view have been held, attended by adjusters of the most experience in the several countries, and representatives appointed by the principal mercantile, shipowning, and insurance associations of America, France, Germany, Holland, Belgium, Denmark, Norway, Russia, England, and other countries. These meetings took place, the first year in Glasgow, afterwards in London, and then in York. Then there was a long interval. In 1876, the subject having been taken up by the 'Association for the Reform of International Law,' a meeting was held at Bremen, and this was followed, last year, by a meeting at Antwerp, at which more than sixty representatives of commercial bodies or persons specially conversant with the subject attended and voted.

"At these conferences it very early became apparent that the differences which alone hindered the establishment of uniformity could be reduced to a very few points. The basis of the law in all the countries is the same. It is the ancient and now universal rule of sea-traffic that whatever is sacrificed for the good of all, to avert a common danger, shall be replaced by the contribution of all. There is no reason why the application of this uniform rule to circumstances which are independent of nationality should not itself be uniform. Nothing but the erroneous application of the rule in this or that country, adhered to out of respect for old customs, can account for the differences which exist. Nor has it been found difficult to point out and rectify those errors. The first set of rules, drawn up at Glasgow in 1860, does not greatly differ from the revised rules drawn up at York in 1864 ; and at Antwerp, after a full discussion, and although many additional rules were proposed and considered, the result was that the York rules were, with slight modifications, re-enacted very much as before. So far, then, as the theory is concerned, it may be said that the basis of a uniform system has been settled.

"There still remains the task of obtaining for this system, in this and other countries, the force of law.

"For this purpose committees have been formed in the several countries, and measures are being adopted, the nature of which must of course vary according to the different political and legislative systems of each country.

"In this country, in order that a united course of action should be adopted, a general conference was resolved upon. At a preliminary meeting held in London early in May, presided over by Mr. George Coyte, chairman of the Average Adjusters' Association, it was resolved that invitations to the conference should be issued as follows : To every shipowner's and steamship owner's society, association, or committee of the United Kingdom, to send two representatives each ; to every chamber of commerce of an English port, and likewise those of Manchester, Birmingham, Sheffield, Leeds, and Bradford, to send two representatives each ; to every association of underwriters, and every salvage association of the United Kingdom, to send two representatives each ; to the Adjusters' Association to send two representatives ; and to Lloyd's and the London Marine Insurance Companies, to send four representatives each.

"The conference was held at the Cannon Street Hotel, London, on Thursday, May 30. It was largely attended by representatives from the above-named bodies, consisting of shipowners, merchants, underwriters, and adjusters.

Lloyd's, however, and the London Salvage Association and marine insurance companies, were not represented.

"Sir Travers Twiss, D.C.L., was nominated chairman, and occupied the chair during the conference.

"The following resolutions were proposed and seconded, put to the vote, and carried unanimously :—

"1. That in the opinion of this meeting, it is desirable that the York and Antwerp Rules of General Average be carried into operation.

"2. That in the opinion of this meeting, the most effectual mode of procedure will be, by a general agreement on the part of shipowners, merchants, and underwriters, to insert in bills of lading and charter-parties the words 'General Average, if any, payable according to York and Antwerp Rules;' and in policies of insurance to add to the foreign general average clause the words 'or York and Antwerp Rules,' so that the clause will run thus: 'General Average payable as per foreign adjustment (or custom), or York and Antwerp Rules, if so made up.'

"3. That a definite date should be fixed for the proposed change: and the date recommended by this conference is the 1st of January 1879.

"4. That, concurrently with these steps, communications shall be opened with her Majesty's Government, through the Board of Trade or otherwise, in view of ultimate legislation in this and other countries.

"5. That a central committee be appointed to carry out the above resolutions in concert with the several local committees existing or which may hereafter be formed, and with the council of the 'Association for the Reform and Codification of the Law of Nations,' and to take steps towards raising funds to meet the necessary expenses: this committee to consist of Messrs. Henry John Atkinson, London; Laurence R. Bailey, Liverpool; E. H. Capper, Cardiff; John Corry, Belfast; Robert N. Dale, Liverpool; John T. Danson, Liverpool; John Glover, London; Richard Lowndes, Liverpool; G. Luckley, Newcastle-on-Tyne; James Park, London; E. E. Wendt, London; John Williamson, Liverpool. With power to add to their number.

"At a meeting of the above-named committee, Mr. John Glover was appointed chairman, and Mr. Richard Lowndes secretary.

"The changes which the adoption of the York-Antwerp Rules will introduce into the English practice are the following :—

"1. No jettison of cargo laden on a ship's deck will be admitted into general average.

"This is already the general rule here, but wood goods have been admitted as an exception to a certain extent—that is to say, a jettison of timber or deals from deck is treated as a 'general contribution' between those parties who have expressly agreed to the shipment on deck. This exception it is proposed to abolish.

"The result will be, that shippers of cargo on deck will recover a loss by jettison direct from their underwriters, provided the cargo is insured with the clause 'in and over all.' In like manner, the loss of freight will be recovered direct from the underwriter on freight, if there is such a clause. The clause 'in and over all' is at present usually inserted in policies on wood goods and their freight.

"2. When a ship is for the common safety taken into a port of refuge, not merely the pilotage and port charges incurred in going into, but likewise those coming out of such port, will be admitted into general average.

"At present the expense of going in is admitted, whilst the corresponding expense of coming out again is customarily excluded. In this respect the present English practice differs from that of every other country.

"3. When, at such port of refuge, it becomes necessary to discharge cargo in order to repair the ship or for other purposes connected with the completion of the voyage, not merely the expense of taking the cargo out of the ship, but likewise the cost of warehousing and putting it back in the ship, will be admitted into general average.

"At present the expense of taking it out is so admitted, but the warehouse rent is made a special charge on the cargo and the cost of reloading a special charge on the freight. In this respect, as in the former, the present English practice differs from that of every other country.

"4. The wages and keep of the crew, during the vessel's stay in such port of refuge, will be admitted into general average.

"This is the rule in most other countries. There is no doubt that this item forms a serious part of the loss actually incurred through bearing up for a port of refuge; and, in cases where such bearing up has saved the ship and cargo from the risk of total loss, it seems to be contrary to principle, as well as impolitic, to throw this loss on the shipowner.

"These are the only changes in English practice. The remainder of the York-Antwerp Rules refer to matters in which the foreign practices are (when these rules are adopted) to be assimilated to ours.

"This committee recommend that the utmost publicity be given beforehand to the proposed change, particularly that shippers of cargo may understand what is intended, and may have timely warning to arrange for the insertion of the necessary clause in their policies of insurance.

"For this purpose it is proposed that those shipowners who intend to avail themselves of the new rules, and those underwriters or representatives of insurance companies who are ready to admit the new clause into their policies, should be invited to join in an announcement of their intention, in order that the same may be generally circulated.

"JOHN GLOVER, *Chairman*.

"RICHARD LOWNDES, *Secretary*."

English and Scottish Criminal Law.—In a recent number of the *Law Magazine and Review* there is an interesting article on "Criminal Procedure in Scotland: its Lessons for England," by Mr. Alexander Robertson, barrister-at-law. After discussing the principal points of difference in the procedure of the two countries, the writer comes to the following conclusions: (1) That coroners in England should be lawyers, paid and appointed by the Crown, and that they should undertake the preliminary investigation of all offences to be tried at the Central Criminal Court, or on Circuit or at the Quarter Sessions; (2) that a Crown office for public prosecutors should be instituted; (3) that the Bar of each Circuit and the Incorporated Society of Solicitors in England should appoint certain of their members to act gratuitously for the poor; (4) that grand juries should be abolished; (5) that the jurisdiction of the Justices should be greatly limited; (6) that the prisoner ought to be allowed to give evidence on oath; (7) that previous convictions should be proved in leading the evidence; (8) that all depositions should be abolished; (9) that the verdict of a majority of a jury should be accepted; (10) that judges be empowered to find, if they think fit, private prosecutors liable for all costs; (11) that the public be excluded from the trial of all indecent offences; (12) that a criminal court of appeal should take the place of the present court of Crown cases reserved; (13) that a code of Criminal Law should be drawn up for the United Kingdom, and that the various jurisdictions should be brought into harmony and placed on the same footing. These suggestions, with perhaps the exception of the

sixth and seventh, seem valuable and practical. There is, however, much to be said against the expediency of allowing a prisoner to give evidence on oath in his own case: prisoners who refused to do this would infallibly be considered in an unfavourable light by the jury; besides, it would be a direct inducement to perjury. With regard to the time when previous convictions ought to be proved, we have always considered the English system to be a better one than our own. The jury have really no interest in knowing whether or not the prisoner has been previously convicted; that is a matter for the consideration of the judge in passing sentence. We recommend, however, the perusal of Mr. Robertson's article to our readers.

Admission to the Bar in England and Ireland.—The Benchers of King's Inns, Dublin, have received from those of the committee of the four London Inns of Court a very palpable snub. The Irish benchers proposed to admit English barristers to practise at the Irish Bar on payment of the necessary fees, and on condition of a similar reciprocity being extended to Irish barristers desiring to practise in England. The English committee declined the offer peremptorily. As to the proposal itself, we think it was injudicious. It is far more likely that English barristers would be brought over here in large cases than that Irish barristers would be brought over in proportionate numbers to England, owing to the inveterate prejudice against everything Irish which exists across the water. From another aspect also we do not regret that the proposal has fallen through. It would have been a step in the direction of the long-contemplated absorption of the Irish judiciary in the English, and the transference of appeals to England. We think that the Irish Bench and Bar should use every exertion to maintain and assert its separate independence. The Irish benchers have now an opportunity of legitimately doing so. An old law requires that students, before being called to the Irish Bar, must keep a certain number of terms—that is to say, eat a certain number of dinners at one of the London Inns of Court, in addition to paying certain fees in London. There is no shadow of justification for this regulation. There is no pretence that any advantage in the way of legal education or otherwise is gained by the Irish student thereby. It entails upon him or upon his friends a heavy and utterly useless expenditure, and, now that continuous attendance at lectures is required, is besides a very practical inconvenience. We do not know that the rule, which is based on an old ante-Union statute, could be abrogated by the Benchers of King's Inns themselves. But if not, they could easily have a clause introduced for the purpose in the Bar Education and Discipline Bill, which will be reintroduced next session. If the English benchers will not recognise barristers called under their regulations, surely they will not continue, if they can help it, to compel Irish students to go to London for no earthly purpose but to fill the coffers of the London Inns of Court.—*Freeman's Journal*.

A Hard-worked Official.—Sir John Holker has been discoursing to an agricultural audience at Clitheroe on the advantages of the position of a farmer and the disadvantages of the position of a law officer. "As to the Attorney-Generalship," he is reported to have remarked, "he would say very little about it. It was not altogether a bed of roses. He made some money out of it, and he thought he earned it very well, for he worked all hours. He was required to do a great deal of work, and some of it for nothing." He "very much doubted whether being member for 'proud Preston' would ever make his fortune," and, in short, Sir John was rather unusually lugubrious. He is not without precedent for his complaint in the evidence given by a predecessor in the office, who stated before the Legal Business Committee in 1875 that the law officers had, under the system then in vogue, to deal "with cases for opinions and reports, amounting in number to over 600 in the year for the different Government departments, without receiving any remuneration for them beyond the salary;" and it need hardly be said that not a few of the roses have slipped from the bed of the Attorney-General. At one time, according to Lord Campbell, a seat was invariably found for the Attorney-General by the Treasury at the fixed price of £500; he was formerly paid for attending Cabinet Councils and the Home Office (see the Report on Legal Business, p. 20), and Lord Campbell says, in his "Lives of the Chancellors," that he had himself, when Attorney-General, received presents of tea from the East India Company, and sugar-loaves from the corporation of Kingston-upon-Hull.—*Solicitors' Journal*.

The Russian Bar.—The *Standard* thus speaks of the Bar in Russia: "The Bar is to this day far behind in its standard of professional honour and dignity. A system obtains of bargaining direct with the client on the 'payment by results' principle. In criminal cases the prisoner will agree to pay his counsel three or four times as much if he secures him an acquittal, and the counsel takes good care to get a large part of this money in advance. A barrister will even descend to frightening his client by exaggerated statements of the danger he is in, and, further, will not scruple to demand, also in advance, payments for 'secret purposes,' that is, for bribing influential officials. Indeed, the Bar in Russia is mercenary and rapacious; and, as the division of duties recognised in England between the solicitor and the barrister is not known in Russia, sharp counsel are brought face to face with their unhappy clients, and take the measure of their means and ignorant credulity. The barrister regulates his fees in much the same way as an advertising quack doctor would do, and carries on the action or cure in the lowest commercial spirit."

[This may be true in some instances, but we believe that there are not a few members of the Russian Bar who would do honour to the profession in any country. Of course the Provincial Bar in a

country like Russia cannot be expected to attain to a very high standard.—ED., *J. of J.*]

WE may direct the attention of our readers to a letter which appears in our pages this month from Mr. Stewart, of Dunedin, relating to the formalities requisite to the due verification in New Zealand of deeds executed in Scotland.

Institute of International Law.—This Association met recently at Paris, and discussed various questions relating to the Law of Nations. We may mention that M. Rivier succeeds M. Rolin-Jacquemyns as secretary.

Prison Congress.—The second International Prison Congress recently held its sittings at Stockholm. The principal subjects under discussion were Penal Legislation, Prisons and Penitentiaries, Reformatories and Preventative Institutions, Punishments, etc.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF PERTH.

Sheriff BARCLAY.

Principal and Agent.—An English house had dealt largely with an agent in Dundee in transactions of jute, and a large balance arose against the agent. On the bankruptcy of a farmer, the agent gave him up as his principal, and a claim being made on the bankrupt estate, the trustee rejected the claim; and on an appeal, the Sheriff, after proof, affirmed the trustee's deliverance by the annexed interlocutor.

"*Perth, 11th July 1878.*—Having heard parties' procurators, and made avizandum with the process and proofs, Finds as matter of fact that the appellants have failed to establish facts and circumstances so as in law to fix liability on the bankrupt estate of Frederick William Cottrell for the claim sought to be ranked on the estate or any part thereof. Therefore dismisses the appeal: Affirms the deliverance of the trustee: Finds the appellants liable in expenses, and remits the account, when lodged, to the auditor to tax.

"HUGH BARCLAY.

"*Note.*—In the Record and at the debate the appellants' solicitor argued the case on a twofold aspect—1st, That Cottrell was principal, and Stewart his agent; or, 2nd, That the speculations from which the claim arose were of the nature of a joint adventure, and that both were in law jointly and severally liable. The affidavit does not fairly raise either of these grounds of liability, but is grounded on the assumption that Stewart had guaranteed the solvency of Cottrell the bankrupt. But be this as it may, the proof supports neither ground of liability.

"It was argued that Stewart being a *commission agent*, there was a presumption that he acted for a third party. But it appears in evidence that he was a salaried servant to a commission agent, and therefore any such business must have been clandestine. On the opposite side, Cottrell was a farmer, and therefore there is no presumption that he cultivated any other field of enterprise.

No doubt it is proved that he did speculate in Stocks, but there is no evidence that he did so in manufactured goods. It is perhaps not at all strange that the name of Cottrell was not disclosed to the appellants. But it is very strange that no record or any the least scrap of paper has been recovered to show transactions of so great amount. Suppose there was proof that Cottrell did advance his friend Stewart the small sum of £100, and that with the view of the appellants' speculations of nearly £8000 in extent, this would not in any way render him liable in the consequences of these hazardous speculations. This advance, for which no voucher has been shown, might have been a loan, and hence the desire of the borrower to show, by letters and telegrams to the lender, that his money was likely to be returned. The correspondence between Stewart and the appellants is very suspicious. Whilst it reflects no small honour on the appellants, it acts very differently on Stewart, who appears anxious to escape by giving up the bankrupt, after his insolvency, as a scape-goat. Suppose that the speculations had turned out profitable, as they were sadly the reverse, Cottrell or his trustee could not, on such evidence as has been laid before the Sheriff, have insisted on receiving the profit on paying Stewart his one per cent. It could not be so maintained, and it must equally be held that the appellants have no claim on Cottrell or his estate. The account No. 5 affords a melancholy specimen of rash and reckless speculations persisted in for a space of time, with the result of about a sixth part of the capital lost. H. R."

Notes of English, American, and Colonial Cases.

PROPERTY IN UNGATHERED ICE IN STREAM NOT NAVIGABLE.

NEW YORK SUPREME COURT, ULSTER CIRCUIT.—January 1878.

Myer v. Whitaker.—S., who had built a dam on a stream on his own land, obtained by grant from O., a separate owner above him, the right to overflow the land of O. without any limitation as to the use of the waters held back by the dam. *Held*, that S. or his vendee was entitled to the ice formed in the water overflowing the lands of O., and could recover the value of the ice taken therefrom by a third person permitted by O. to take such ice. *Marshall v. Peters*, 12 How. Pr. 218, overruled. Plaintiff who had purchased from S. the right to take from the pond formed by the dam, upon an occasion of high water fastened the ice by chains so that it did not escape, which it otherwise would have done:—*Held*, that plaintiff had actual possession of the ice, and such possession was entitled to protection.

Action to recover the value of ice taken by defendants Whitaker and Finger. The facts appear in the opinion. *Peter Cantine*, for plaintiff. *Theodore B. Gates*, for defendants.

WESTBROOK, J.—This action, which was one for the recovery of the value of certain ice taken from a pond caused by a dam across the Esopus creek, in the town of Saugerties, Ulster county, was a trial by the Court without a jury. On such trial the following facts were established:—

The Esopus creek is a natural running stream of water emptying into the Hudson river at Saugerties aforesaid. About the year 1826 or 1827 a dam twenty-eight feet in height was built across it, and has ever since been maintained, which ponds and flows back the waters of the stream. One Joseph B. Sheffield, at the time of the occurrence of the events out of which this suit originated, was and is now the owner of the land upon which the dam rests, and also was the owner of all the land covered by the waters of the pond, except a small part thereof, which belonged to the Overbagh family. That family, however, by deed dated April 24, 1841, for the consideration of

\$5750 had conveyed to the grantor of Sheffield "the right, privilege, and liberty to overflow so much of the said lands, falls, and water privileges above mentioned as are now, or at any time hereafter may be, overflowed by means of the said dam across the Esopus in the year above mentioned, or by any other dam which may be erected in place of said dam." The recitals in the deed show that the dam was erected during the years 1826 and 1827, and the waters by means thereof had overflowed the lands of the grantors, and rendered valueless to them certain falls in the stream.

In February 1876 the firm of Myer & Rosepaugh, of which the plaintiff is the survivor, purchased all the ice in the pond, formed and to be formed—there being some reservations which are not material to be stated—from Joseph B. Sheffield.

Previous to the gathering of the ice from the pond, a freshet occurred in the Esopus creek, which carried out of the pond a large part of the ice formed therein, and loosened that which was in controversy in this action from the shore, and would probably have swept this out also, had not the plaintiffs, by holes cut therein, fastened it to the shore and thus detained it.

Ice during the winter of 1876 was comparatively scarce and valuable. The plaintiffs had a contract for all the ice in the pond at \$1.75 per ton stacked, and the cost of stacking and cutting was about half that sum, leaving a profit of 87½ cents per ton.

After the plaintiffs had commenced to remove and gather the ice, the defendants went to the part of the pond over the Overbagh lands, by permission from such family, and cut a large quantity of ice thereon against the forbidding of the plaintiffs, and in spite of such forbidding opened a canal or channel across the pond, and over that part of it which was upon the land to which Sheffield had title, and floated the ice so cut by them through such canal or channel, and gathered and sold the same in the New York market. For the value of the ice so taken by the defendants a recovery is sought in this action.

As the firm of Myer & Rosepaugh, of which plaintiff is the survivor, claims under a purchase from Joseph B. Sheffield, the first question which this case presents is: What right of property, if any, did Sheffield have in the ice cut and removed by the defendants? The water from which the ice was formed was ponded and gathered by him for his own use. He owned the dam which ponded and held them, which was located upon his own property. All the land under the water of the pond was his, except a small part thereof owned by the Overbagh family, and upon and over that part of the land he held, by purchase as the owner thereof, the right to flood and to hold the water. In a basin then, formed mostly out of his own land and in part out of the land of another, the right to use which for that purpose had been purchased for a valuable consideration from the owner, Mr. Sheffield had gathered a large body of water for his own use and benefit. The manner of its use and the mode of its application to his own use was not restricted by any deed, conveyance, or title which he held, nor by any rule of law except the general one, that the flow of a natural stream shall not be so obstructed as to deprive owners below of the beneficial use and enjoyment of the stream and its flow. So long as such owners below were not interfered with, Mr. Sheffield, as the former and owner of the basin which held the water, had the right to use such water for his own profit; he could use its momentum to propel machinery, and let that right to others; he could use the water for domestic and farming purposes, and could let and rent that right to others. All these consequences follow, it seems to me, from his act of appropriation and gathering them. The land basin, or vessel which held them, was his as owner in fee or as owner for use. By his dam he had filled that basin or vessel, and the water thus gathered or held therein was his, subject only to the exception that the beneficial enjoyment of owners below should not be interfered with, just as much as if he had gathered them for his own use and benefit into a tank or cistern which had been constructed for that purpose. The right to use and to

sell the water in its *liquid* form is only a part of his right. When the form of the water changed by cold into *ice*, Mr. Sheffield had, it seems to me, the right to use it in its congealed form, and the same right to sell it and permit it to be gathered before it returned to its liquid state, as he had to use and dispose of it when in the latter condition. There can be no difference as to his rights growing out of the state of the water.

All this appears so elementary and clear, and so plainly deducible from principles long established, as to be scarcely worthy of argument, were it not for the case of *Marshall v. Peters* (12 How. Pr. 218), upon which the defendants rely. In that case, which was very similar to this, a Judge (Emott), for whose learning and integrity I have a profound respect, held that the party purchasing ice from the owner of a pond could not have an injunction against a trespasser who undertook to remove it. If the refusal to allow the injunction to continue had been put upon the ground that the plaintiff had an adequate remedy at law, and the insignificant value of the ice in controversy, the decision would not apply to the case before us. The learned Judge, however, goes further, and states principles and reasons for his conclusions, which, if they are sound, control this cause. Examination and reflection compel me to dissent from the opinion rendered in the case cited, and the reasons therefor will now be stated.

The Judge (pages 222 and 223) says: "But it is quite as far from being true, that Mr. Lent is the owner of the water in this pond, or that it, or the ice formed from it, is his absolute property. The water in a running stream can never become, in any such sense as was claimed on the argument, the property of a riparian proprietor, even if he owns both banks, and the stream passes through his lands. All the property that a man can acquire in flowing water is a right to its use. He may have a certain right of property in it, but the water itself is not property. He has a right to its natural flow and to use it for his cattle, or his household, or upon his mill-wheels. But he cannot stop its current, nor direct its flow, nor increase or diminish it in any appreciable quantity. He must allow the waters to pass out of his hands as they enter them, and his only right is a right to use them as they flow."

The error, with deference it is said, which the learned Judge makes, is the over-statement of a general proposition, and the want of a proper application of certain qualifications, the existence of which he recognised, to the general rule which he asserts, and upon which his decision is founded. It may be true, as he says, that the possessor of the mill-pond is not the "owner of the water," and the same is not "his *absolute* property," provided, the Judge means, that the owner of the pond does not own absolutely and exclusively *all* the water therein. This, of course, must be true, for if it were not, the riparian owner above could use the entire water of the stream, and thus prevent its natural flow and beneficial enjoyment by the owners below. It is also, however, true, and this the Judge admits when he says "he may use it for his cattle, or his household, or upon his mill-wheels," though he fails to give it weight, that the owner has the absolute property in the use of the water as it flows, not only in the application of its momentum, but also in its removal from the stream for consumption, provided the usefulness of the stream to the owners below is not impaired. And it follows from this concession, because it is one of the rights of absolute property, that if such ownership as has been described is in one man, that he may convey the right he thus owns to another, the buyer taking it with the same limitations, that the title which he acquires to the water, liquid or solid, is subordinate to the rights of owners below, which must not be interfered with. To this extent then there is absolute ownership in water—or its use, if that expression be preferred—which the learned Judge concedes. Having made this concession, it seems to me that his statement, that there can be no "absolute property in the water of a pond, or the ice formed from it," is too broad if applied to all the water, and is not limited in meaning as the Judge in his general argument seems to admit. It is too broad, because the right to use the water for domestic purposes, or to sell

it for his own profit, and take it from the pond, and from the general flow for these purposes, subject only to the exception in favour of owners below, before stated, being conceded, it follows that the owner has some absolute property in the water—in its normal state or when frozen—which he needs, and which is capable of being enforced against one who, without right, deprives the owner of its use or of his gains from a sale. If as against such owner and his needs, the stranger can take some, he may take all, and the ponder of the waters would have no rights which the law can protect. If the Judge had borne more clearly in mind the extent of absolute property in water which may exist, and of his concessions, he could not have held that the congealed water which the owner needed for his own profit, and which did not interfere with the natural flow of the stream, nor with the beneficial enjoyment thereof by riparian proprietors below, could be removed by a mere naked wrong-doer at pleasure. This conclusion I regard as unsound, and is entirely at war with other adjudications and principles which will now be referred to.

In *Mill River Woollen Manufacturing Co. v. Smith* (34 Conn. 462) it was held "that owners of the water of a mill-pond own the ice formed upon it, and the riparian proprietors had no right as owners of the soil to remove it."

In *State v. Pottmeyer* (33 Ind. 402; also reported in 5th American Reports, 224) it was held—"When the water of a flowing stream, running in its natural channel, is congealed, the ice attached to the soil constitutes a part of the land, and belongs to the owner of the bed of the stream, who has the right to prevent its removal." This case is worthy of attention, because it was most carefully considered and elaborately discussed. It had been to the Supreme Court of Indiana once before upon the quashing of the indictment. The Court then held the indictment good, because the ice might have been taken from a pool upon the land of the owner, and therefore refused to consider or decide whether there could be property in ice formed in a running and unnavigable stream. Upon the trial of the indictment, the Court below held there could be no property in ice formed in a running stream. The Court above held the contrary, and reversed its judgment. See an article upon this case in 3 *Albany Law Journal*, page 386.

In *Elliot v. Fitchburg Railroad Co.* (10 Cush. 191), in *Brown v. Brown* (30 N. Y. 519), and in many other cases, it has been held that the ponder of waters has a right to make any use thereof which is not inconsistent with the rights of owners below. The effect of this doctrine, which is identical with that stated in the beginning of this opinion, is that this right of use, which may be to propel machinery for domestic purposes, for sale and for hire, is property of which the owner cannot be deprived by a mere wrong-doer. If owners below are interfered with, they will be protected against the improper or wasteful use of the water by the owner above, but as against all others who are strangers to those rights, the owner of the pond will be protected in the enjoyment of the use of the water, whether it be carried to his mill to propel his machinery, to his house or barn for consumption, or to the property of others to whom he sells or lets it for like use, and this right of use of the water is without regard to its state or condition. It might as well be said that its use is confined to the frozen state entirely, as to say it is confined to the liquid solely. This principle, so long and well settled, must control this cause.

The only seeming difficulty which this case has presented to my mind grows out of the fact that the ice in controversy was taken from that part of the pond which was above the lands of the Overbagh property, the owners of which gave permission to the defendants to do the acts complained of. Reflection, however, satisfies me that this fact cannot prevent a recovery, because,

First, The defendants not only removed ice from that part of the pond which was upon the Overbagh land, but against the forbidding of the plaintiff they cut a channel across the entire pond, thus removing and destroying ice which was formed in that part of the pond which was upon the Sheffield property, and for the ice thus destroyed at least there must be a recovery.

Second, By the conveyance of the Overbagh family, the right to flow back the waters, and hold them in the pond for the benefit and use of the owner thereof, is transferred, and that right Mr. Sheffield now has. There was no limitation whatever upon the use to which the pond could put the waters, nor any reservation whatever to the Overbagh family in the water. In short, the effect of the Overbagh deed was to enable the owner of the right, by a dam, to make a large basin to hold water for his own use and purposes. Whatever rights, if any, which the Overbagh family had or retained in the water, were subordinate to those of the owner of the right to pond. Being subordinate to those rights, the owner of the pond having need of so much thereof as was frozen, and such use being consistent with his ownership, as we have endeavoured to show, no act or consent given by any of the Overbagh family could deprive the owner of the ponded water of the use to which he had applied it. This very principle is decided in *Mill River Woollen Manufacturing Co. v. Smith* (10 Conn. 462), before cited, in which it was held that the owner of the pond as against the owner of the land could prevent the removal of the ice. If it can be done because the owner needs the water in its liquid form, it can be done when the owner requires and needs it in its congealed form. The right to pond being for an unspecified purpose, its right of use and its manner of use depend upon the needs of the owner, to which all other rights are subordinate.

The cause has thus far been considered upon the abstract right of the plaintiff obtained by the purchase from Sheffield, and our conclusion is that the action can be maintained upon that ground alone. There is, however, another view which is worthy of attention. After the purchase, Myer & Rosepaugh, who were the original plaintiffs, and to all their rights the present plaintiff, as survivor, succeeds, by their own exertions in a freshet had saved the ice in controversy from being lost. By anchoring it to the shore, and by labour performed thereon, they were in actual possession when the defendants took and converted it. If, with the consent of Mr. Sheffield, the plaintiffs had taken from the pond a quantity of its water, and being in actual possession, the defendants had deprived them of it, could the plaintiffs have recovered? And when a part of the water had assumed the form of ice, and is thus separable from the rest of the water, and in that form capable of being possessed and held, is in fact thus held and possessed and retained in position for removal, can such possession be taken from them and they be remediless? That which was thus possessed by them and taken from them by others was valuable and can be recovered for, though it still lay in the pond where they had secured it for removal and stacking, though it had not yet been actually removed or stacked. All the possession which could be taken had been taken, and what had been was so marked and visible, and exercised over and toward property capable of actual possession, that in such possession the plaintiffs should be protected.

The conclusion is that the plaintiff is entitled to judgment. The plaintiff's attorney will prepare findings which will be settled on notice.—*Albany Law Journal*.

NULLITY OF MARRIAGE.—*Scottish irregular marriage—Residence in Scotland—Rule of computation of time.*—A. and B., who were both domiciled in England, left London for Scotland on the evening of the 30th of June 1870. They arrived at Edinburgh between five and six o'clock on the following morning, the 1st of July, and they lived in Scotland until the 21st of July, on which day, about 11.30 A.M., they contracted an irregular marriage by declaration before the Registrar at Edinburgh. By 19 & 20 Vict. c. 96, s. 1, it is enacted that "no irregular marriage contracted in Scotland by declaration, acknowledgment, or ceremony, shall be valid unless one of the parties had, at the date thereof, his or her usual place of residence there, or had lived in Scotland for twenty-one days next preceding such marriage :"—*Held*, on the construction of the statute in accordance with the principles of Scottish law, that the parties had not lived

the prescribed time in Scotland, and that the marriage was invalid.—*Lawford v. Davies*, 47 L. J. Rep., P., D. & A. 38.

MARINE INSURANCE.—Policy—Construction—Deviation.—In an action on a policy of insurance on four steam-pumps insured for a voyage on a salvage steamer, “at and from A. to the Alexandra steamer ashore near D., whilst then engaged at the wreck, and until again returned to A.,” it was proved that during the return voyage the steamer Alexandra was obliged by stress of weather to run to D. for refuge, and was lost with the pumps on board before she could arrive there :—*Held*, that there had been a deviation from the risk insured, and that no action would lie on the policy.—*Wingate, Birrell, & Co. v. Foster* (App.), 47 L. J. Rep. Q. B. 525.

JURISDICTION.—Restitution of conjugal rights—Service of petition out of jurisdiction.—For the purposes of the question of the jurisdiction of the Divorce Court, the British Colonies, as well as Ireland and Scotland, are to be deemed foreign countries.—*Firebrace v. Firebrace*, 47 L. J. Rep., P., D. & A. 41.

The Court has no power to order, in suits for restitution of conjugal rights, service of the petition out of the jurisdiction.—*Ibid*.

It is not inconsistent with the principle that a wife's remedy for matrimonial wrongs must be usually sought in the place of the husband's domicile, that she may be allowed in some cases to obtain relief against her husband in the tribunal of the country in which she is resident though not domiciled. But where the husband, who, while resident in England, refused to receive his wife into his home, left the country before the institution by her of a suit for restitution of conjugal rights, the Court held that it had no jurisdiction to entertain the suit.—*Ibid*.

PUBLIC HEALTH ACTS.—Clerk to Local Board—Bye-laws as to rescission of resolution—Dismissal of servant—Quo warranto.—A bye-law of a Local Board of Health, duly made and confirmed, forbade the rescission of any resolution of the Board, unless at a meeting where at least as many members were present as were present when such resolution was passed :—*Held*, that such bye-law did not apply to the dismissal of the clerk to the Board ; for a resolution to effect this was not in the nature of a rescission of that by which he had been appointed, but was a new resolution in itself. Such clerk, therefore, holding his office under the Public Health Acts, “at the pleasure of the Board,” could not obtain an information in the nature of *quo warranto* because of his dismissal by the resolution of a meeting consisting of fewer members than were present when he was appointed.—*Ex parte Richards*, 47 L. J. Rep. Q. B. 498.

Where application is made for an information in the nature of a writ of *quo warranto* by a person who is liable to immediate dismissal from the office in which he seeks to be reinstated, the Court will not, in the exercise of its discretion, grant the application.—*Ibid*.

WINDING-UP.—Close of voluntary winding-up—Dissolution—Subsequent petition for compulsory winding-up—Jurisdiction.—The 145th section of the Companies Act, 1862, which saves the right of a creditor to have a compulsory winding-up, if he is prejudiced by a voluntary winding-up, only applies to a creditor who comes to the Court before the dissolution of the company, and shows that his rights are being prejudiced. After the time limited by section 143 for the final dissolution of a company, the Court has no jurisdiction to open the voluntary winding-up and make a compulsory order, except, it may be, on the ground of fraud. *Sed, quære*, whether the proper remedy in such a case for the party prejudiced by the winding-up is not an action for damages against the parties personally guilty of the fraud.—*Re The Pinto Silver Mining Co. (Lim.)* (App.), 47 L. J. Rep. Chanc. 591.

LEASE.—Agreement for—Uncertainty.—An agreement to let for a term did not specify the date of the commencement of the term :—*Held*, that there was a valid agreement to let for a term commencing on the date which the agreement bore.—*Juques v. Millar*, 47 L. J. Rep. Chanc. 544.

BANKRUPT'S PROPERTY.—*Contract to perform works—Dismissal and bankruptcy of contractor—Right to proceeds of plant—Mutual dealings.*—A contract for executing sewage works made between a contractor and Improvement Commissioners, provided that all plant brought by the contractor on to the works should be deemed to be the property of the Commissioners, and should not be removed during the progress of the work without the written order of their engineer; and in case of suspension of the works by their engineer for any default of the contractor, or of the work being taken out of the contractor's hands, the same should be subject to be used as should be ordered by the engineer in and about the completion of the works. The engineer suspended the works, and the Commissioners took possession of the plant and completed the works. The contractor having become bankrupt, and a sum of £2876, 7s. 5d. having been certified to be due to the Commissioners from him for default under the contract, the Commissioners claimed to retain the plant, which was sold by consent for £685 :—*Held*, first, that the contract gave the Commissioners no property in the plant, but only a right of user; and secondly, that this right of user was not such a "dealing" within the meaning of section 39 of the Bankruptcy Act, 1869, as to give them a right to set off the value of the plant against the sum due to them from the contractor.—*In re Winter*; *ex parte Bolland*, 47 L. J. Rep. Bankr. 52.

WINDING-UP.—*Rent—Distress by superior landlord.*—The 163rd section of the Companies Act, 1862, only applies to cases in which a creditor of the company is proceeding against the estate and effects of the company. Where, therefore, a superior landlord levied a distress for rent, and seized the goods of a company in liquidation which were on the premises of his lessee, the company being in occupation of the premises under an arrangement with the lessee, but no assignment or underlease having been made to the company :—*Held*, that the superior landlord, not being a creditor of the company, could not be restrained from proceeding with his distress.—*Re Lundy Granite Company* (40 L. J. Rep. Chanc. 588) discussed and approved. *In re Regent United Service Stores*; *ex parte Burke* (App.), 47 L. J. Rep. Chanc. 677.

STATUTE.—*Effect of repeal of special words on general words.*—In order to ascertain the effect of a repealing statute the repealed words must be looked at. Where in any statute special words are followed by general words, any subject-matter which is aptly described by the special words comes within the purview of the statute by force of the special words, and not of the general words. If, therefore, the special words are repealed, the subject-matter ceases to be within the purview of the statute, though aptly described by the general words in the absence of the special words.—*Attorney-General v. Lamplough* (App.), 47 L. J. Rep. Exch. 555.

PARTNERSHIP.—*Joint adjudication—Separate estate held to be joint estate—Reputed ownership—Order and disposition.*—P., carrying on business alone under the style of P., Son, & Company, employed his son to assist in the management of the business, and held him out as a partner to some of his creditors. P. and his son having been jointly adjudicated bankrupts as ostensible partners,—*Held*, that the entire separate estate of P., which was the only asset of the business, being in the apparent possession and reputed ownership of the firm with the consent of the true owner, formed the joint estate of the firm. Leave to appeal to the House of Lords refused.—*In re Pulsford*; *ex parte Hayman* (App.), 47 L. J. Rep. Bankr. 54.

PARTNERSHIP.—*Expiration of lease of part of partnership premises during the partnership term—Partner without consent of co-partner renewing lease in his own name on behalf of the partnership.*—In a partnership at will there is no implied authority at law giving to one partner, without the consent of his co-partner, power, on the expiration of the lease of the premises where the partnership business is being carried on, to take a renewed lease of the same premises or a lease of any other premises for the purpose of carrying on the partnership

business or any portion of it.—*Clements v. Norris* (App.), 47 L. J. Rep. Chanc. 546. The same rule, in the absence of stipulations to the contrary, applies to partnerships created by deed.—*Ibid.* *Semble*, that the rule would equally apply where partnership premises are burnt down or otherwise destroyed, or are taken by a railway or any other corporation under the powers of their special Act.—*Ibid.*

PARTNERSHIP.—*Covenant not to engage in any other business, except on account of the partnership*—*Breach*—*Bill for an account of profits.*—The common clause in partnership deeds that “neither partner shall engage in any other business, except on account of and for the benefit of the partnership,” being merely a negative covenant, the only remedy for a breach thereof is an action for an injunction to restrain the continuance of the breach, or for a dissolution of the partnership, or for damages. Where, therefore, partnership articles contained such a clause, and one of the partners clandestinely purchased a share in another business, not in rivalry with the partnership, and from which no damage or loss whatever resulted to the partnership:—*Held* (affirming the decision of the Master of the Rolls), that the other partners had no equity against the defaulting partner for an account of the share and profits made by him in the other business.—*Dean v. M'Dowell* (App.), 47 L. J. Rep. Chanc. 537. Per Curiam.—In such a case the damages would be merely nominal.—*Ibid.* *Semble.*—In order to sustain an action for an account of profits in such a case, the clause should provide that, in case of any breach, the other partners shall have the option either of taking to the share and profits of the defaulting partner in the other business, or of leaving him alone to bear the loss, if any, resulting therefrom.—*Somerville v. Mackay*, 16 Ves. 382, distinguished. *Ibid.*

PARTY WALL.—*Tenant in common*—*Right to pull down or repair*—*Common law rights*—*Metropolitan Buildings Act.*—In the absence of evidence as to the ownership of a party wall, a jury is entitled to find that it is owned by the adjoining proprietors as tenants in common.—*The Standard Bank of British South Africa v. Stokes*, 47 L. J. Rep. Chanc. 554. At common law there was no action against a tenant in common for pulling down a party wall for the purpose of building a new one, or for repairing a party wall, or for replacing an old foundation by a new one, even without notice to the adjoining owner. In such a case there is no destruction or destructive waste.—*Ibid.* But the rights and duties of adjoining owners, as defined by the Metropolitan Buildings Act, 1855, are in substitution of those which existed at common law, and are not merely an addition thereto.—*Ibid.* The plaintiffs and defendant were adjoining owners, and there was a party wall between their respective premises. The defendant gave notice, under the 85th section of the Metropolitan Buildings Act, of his intention to raise the party wall and do other works. By that section the plaintiffs were to express assent to the work within fourteen days, or dissent was to be inferred. Each party appointed a surveyor; but the plaintiffs never expressed assent to the work, although correspondence passed between them and the defendant. By the 7th section, in case of difference between the parties, unless they agree to appoint one surveyor, they are each to appoint one, and those two to appoint a third, and such one or two or three surveyors are to make an award:—*Held*, that in the absence of consent by the plaintiffs, a difference had arisen, and the defendant was committing a breach of the Act in proceeding with the work without such appointment of surveyors and award.—*Ibid.* The term “raise” in sub-section 67, section 82, is not confined to raising above ground, but includes raising a wall by something added to the foundation.—*Ibid.*

SHIP AND SHIPPING.—*Contract for iron to be delivered during specified months*—*Equal monthly quantities*—*Action for demurrage.*—Defendants contracted to buy from plaintiff from 5000 to 6000 tons of iron-ore, to be delivered at Cardiff “during the months of June, July, August, and September.” It appeared from the correspondence between the parties which led to the contract that

plaintiff had arranged with correspondents at Carthage for the supply and shipment of the ore. By the 28th of July 4623 tons of ore were delivered to and accepted by defendants, and on the 29th of July the *Nero* arrived with 767 tons more, notice at the same time being given to defendants of her readiness to discharge. There was considerable delay in discharging the *Nero*, she having made an exceptionally short voyage, and for her detention beyond the lay-days, plaintiff had to pay demurrage to the extent of £150, which he now sought to recover from defendants. The jury found that the tender was a reasonable one, but defendants contended that the quantity ought to have been distributed rateably over the four months, and that, not being bound to accept the *Nero's* cargo till September, they were not liable to pay the demurrage sued for:—*Held*, by Lush, J., that the contract gave the option to either party to deliver or to demand the amount contracted for; and as no provision was made for exercising the option at any given time, whether in the first month or the last, plaintiff could not tell, until the option was exercised, how many tons should be delivered in any month; also, that the circumstances showed that the parties could not have contemplated equal monthly quantities.—*Calaminus v. Dowlais Iron Company (Lim.)*, Q. B. 575.

SHIP AND SHIPPING.—*Non-delivery of cargo—Right of captain to sell—Duty of captain to give notice to shipper.*—In an action against a shipowner for non-delivery of a cargo of maize, which had become heated, and was sold by defendant at an intermediate port during the voyage, the jury found that the cargo was damaged by its own inherent vice; that it was impossible for defendant to carry it to the port of destination; that the sale was what a prudent man would have done under the circumstances; but that there was no such urgent necessity for the sale as to give no time or opportunity to give notice to plaintiff, the owner of the cargo:—*Held*, on these findings, that defendant had no right to sell without the plaintiff's consent, and that the action would lie.—*Acatos v. Burns* (App.), 47 L. J. Rep. Q. B. 566.

COMPANY.—*Payment for future advertisements by fully paid-up shares.*—A., the proprietor of a country newspaper, agreed to advertise a company's prospectus for three months on the terms of receiving payment in seventy-five fully paid-up shares of £1 each. The shares were accordingly allotted to him as fully paid up, and he returned a receipted bill for £75. No contract in writing was filed with the Registrar of Joint-Stock Companies, as required by section 25 of the Companies Act, 1867. Upon the winding-up of the company A. was fixed upon the list of contributories, on the ground that his shares were issued subject to the payment of the whole amount in cash, according to the provision of that section; and upon appeal the decision was upheld.—*In re The Church and Empire Insur. Co.; Andress's Case* (App.), 47 L. J. Rep. Chanc. 679.

LEASE.—*Breach of covenant to keep premises in proper condition.*—Where after the granting of a lease an Act of Parliament has been passed which renders it illegal to use the premises for the purpose for which they were let, the refusal to permit them to be used for that purpose is no breach of a covenant for quiet enjoyment or of a covenant to keep the premises in proper condition.—*Newby v. Sharpe* (App.), 47 L. J. Rep. Chanc. 617.

LEASE.—*Covenant by lessee not to use premises as a "beer-shop"—Sale of beer not to be consumed on the premises.*—Defendant, as assignee of a lease, granted in 1868, covenanted (*inter alia*) that he would not permit a certain house "to be used as a beer-shop." Defendant, who carried on the business of a grocer at this house, had subsequently obtained a licence for the sale of beer not to be consumed on the premises; and in pursuance of the licence beer was sold on the premises, but not drunk thereon:—*Held*, that there had been a breach of the covenant.—*Bishop of St. Albans v. Buttersby*, 47 L. J. Rep. Q. B. 571.

CHARITY.—*Gift for the relief and use of the poorest of my kindred—Cyprus.*—In order that a gift "for the relief and use of the poorest of my kindred" may be good as a charitable bequest, the word "poorest" must mean "poor" or "very

poor," and not "the least wealthy of a number of wealthy persons." The *dictum* of Wickens, V.-C., in *Gillham v. Taylor* (42 Law J. Rep. Chanc. 674; s. c. Law Rep. 16 Eq. 581), disapproved of. *The Attorney-General v. The Duke of Northumberland*, 47 L. J. Rep. Chanc. 569. Testator gave for the use and relief "of the poorest of my kindred," such as were not able to work for their living, namely, sick, aged, and impotent persons, and such as could not maintain their own charge, the sum of £1000 to be laid out in the purchase of lands of the value of £60 per annum at the least, and the rents and profits to be paid yearly unto them by his executors; and he declared his meaning to be that in the bestowing and distributing of his estate and goods to the poor to charitable uses, it was according to his intent and desire that those of his kindred who were poor, aged, impotent, or any other way unable to help themselves, should be chiefly preferred and respected. The sum was invested in the purchase of an estate in London, and the income accruing from the investment, owing to building and other causes, increased to an enormous extent, while the number of the persons who claimed to be testator's kindred, and as such entitled to the fund, was very large, and in many cases the claimants were unfit objects of charity. Accordingly in 1875 a scheme was directed, and in settling the scheme a question was raised "whether any and what portion of the income of the trust estate could, and if it could, whether it ought to be appropriated to the benefit of any persons not being kindred of the founder:"—*Held*, that the income was applicable primarily, and so far as was required for the purpose, for the relief of the poor kindred of testator, poor according to the definition in the will, and subject thereto, was applicable for the benefit of charitable objects other than the kindred of testator.—*Ibid*.

CHARTER-PARTY.—*Construction—Time—Despatch-money for all time saved.*—Under the terms of a charter-party, cargo was to be shipped at the rate of 200 tons per running day, and to be discharged as fast as ship could deliver, not exceeding 200 tons per working day. Demurrage, if any, at the rate of 20s. per hour, except in certain cases, and despatch-money 10s. per hour on any time saved in loading or discharging. Ship to load and discharge by night and by day, and as rapidly as possible when required by shippers, consignees, or charterers:—*Held*, that, according to the true meaning of the charter-party, despatch-money was payable for every hour saved during the whole twenty-four hours, and not merely in respect of a working day of twelve hours.—*Laing v. Hollway* (App.), 47 L. J. Rep. Q. B. 512.

HUSBAND AND WIFE.—*Separation by agreement—Authority to pledge husband's credit—Inadequacy of wife's income.*—When a wife lives apart from her husband under an agreement by which she is to receive a specified income for her maintenance, and is not to apply to him for anything more, she has, so long as he fulfils those conditions, no authority to pledge his credit; nor can any such authority be implied from the alleged inadequacy of her income.—*Eastland v. Burchell*, 47 L. J. Rep. Q. B. 500.

COMPULSORY PILOTAGE.—*Continuation of pilot's employment.*—A vessel in charge of a pilot whom the master was compelled to take, and who had been engaged to take her into dock, was brought to anchor, being prevented by the state of the weather from going into dock. Whilst so at anchor she drove into collision with the *T. Z.*:—*Held*, that the pilot was still in charge of the vessel.—*The Princeton*, 47 L. J. Rep. P., D. & A. 33.

DRAMATIC COPYRIGHT.—*Infringement—Materiality of part appropriated—Action referred to decision of Judge—Explanation by Judge of his finding.*—To support an action for infringement of dramatic copyright under 3 & 4 Will. IV. c. 15, s. 2, it must be proved that defendant has taken a substantial and material part of plaintiff's production.—*Chatterton v. Cave* (H. L.), 47 L. J. Rep. C. P. 545. Where by agreement the jury were discharged and the cause submitted to the decision of the Judge:—*Held*, that on a motion for a new trial or to take a verdict for plaintiffs, it was competent for the Judge to explain to the Court the reasons and precise meaning of his finding.—*Ibid*.

SOLICITOR AND CLIENT.—*Bills of costs—Series of bills or one bill—Taxation after twelve months.*—The old rule of common law that the retainer of a solicitor for a particular business is a retainer for the purpose of carrying through that business to a conclusion, and that until such conclusion he has no cause of action against his client, is founded on the principle of entirety of contract, and is not to be extended to the case where a solicitor undertakes a business of a complicated nature, *e.g.* the administration of an estate; in such case the solicitor's bill of costs for carrying such business through is not necessarily to be treated as one bill.—*In re Hall*, 47 L. J. Rep. Chanc. 621.

NEGLIGENCE.—*Innkeeper—Liability for injury to guests.*—It is the duty of an hotel-keeper to take reasonable care of the persons of his guests, so that they are not injured by reason of a want of such care on his part whilst they are in the hotel as his guests.—*Sandys v. Florence*, 47 L. J. Rep. C. P. 598. A statement of claim alleged that, while plaintiff was using an hotel, of which defendant was proprietor, as a guest for reward to defendant, by the negligence of defendant the ceiling of the room in which plaintiff then was, fell upon and injured him:—*Held*, on demurrer, that such statement sufficiently showed a cause of action.—*Ibid.*

CONTRACT.—*Master and servant—Agreement in fraud on a third party—Absence of damage.*—An agreement made with the purpose of doing something which is calculated to defraud or injure a third party is illegal and void as between the parties to it; and it makes no difference that no damage has in fact been sustained by such third party.—*Harrington v. The Victoria Graving Dock Company*, 47 L. J. Rep. Q. B. 594.

POOR LAW.—*Settlement—Illegitimate pauper.*—Up to the time of the passing of the Poor Law Amendment Act, 1876, an illegitimate child followed the settlement of the mother until the age of sixteen, but after sixteen the child's birth was the place of settlement. Section 35 of the Poor Law Amendment Act, 1876, which by paragraph 1 abolishes derivative settlements, enacts by paragraph 2 that "an illegitimate child shall retain the settlement of its mother until such child acquires another settlement:—"—*Held*, that this statute did not act retrospectively so as to affect the case of an illegitimate pauper who, before the passing of the statute, had attained the age of sixteen.—*Guardians of Tenterden Union v. Guardians of St. Mary, Islington*, M. C. 81.

ALHOUSE.—*Transfer of licence—Application to special sessions for licence to new occupier, when to be made—Expiration of licence of preceding occupier.*—A., who was duly licensed in respect of certain premises, gave up possession of them on the 3rd of August to B., who was authorized by the justices, under 5 & 6 Vict. c. 44, to continue the business of the house till the next special sessions on the 11th of September. Meanwhile the general annual licensing meeting was held on the 28th of August, and B.'s application for a transfer was not granted, and was finally refused at the adjourned general meeting on the 23rd of September, to which date the justices had extended the authority granted by them under 5 & 6 Vict. c. 44. B. gave up possession to C. on the 28th of September, whose application for a licence at the next special sessions on the 23rd of October failed on account of his having omitted to give the proper notices, and D. therefore took the premises, gave the notices, and applied as a new tenant, under section 14 of 9 Geo. IV. c. 61, to the justices at special sessions in January for a licence. The justices refused the application on the ground that as there was no licence in existence at the time of the application in respect of the premises, they had no jurisdiction:—*Held*, that the decision of the justices was right.—*In re Todd*, 47 L. J. Rep. M. C. 89. *Semble*, per COCKBURN, L. C.-J., and MANISTY, J., that the words "any new tenant" in section 14 of 9 Geo. IV. c. 61, are not restricted to a tenant next in succession to the licensed occupier who has given up possession; and that the justices would have jurisdiction to grant a licence to any succeeding tenant applying during the currency of the old licence.—*Ibid.*

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PROLEGOMENA TO A REASONED SYSTEM OF INTERNATIONAL LAW.

Professor LORIMER's Introductory Lecture to the Class of Public Law in the
University of Edinburgh, November 1878.

THE life of man upon earth is a perpetual and gradual revelation to him of the laws by which that life is governed. It is in this form that the process of evolution, which Mr. Darwin has traced throughout nature, manifests itself after the stage of conscious and responsible existence has been reached. As progressive, this revelation of law is always incomplete. The completion of the revelation would involve the extinction of the subject of which it is an attribute—of the existence of which it is a condition *sine quâ non*. A man with a perfect knowledge of the laws of his own life would have reached the limit of that life itself, and attained to what may possibly have been the original conception of the Buddhist Nirvana. But, be this as it may, his human existence at all events would have ceased; for if his will were coincident and his power coextensive with his knowledge, he would be a god; if they were the reverse, he would be a devil; but in neither case would he be a man.

And what is true of the human unit is true of the human aggregate, of the life of the State as of the life of the citizen. Lastly, it is true not only in its ethical and intellectual, but in its physical aspects. The laws of health and wealth are progressively revealed, and man becomes gradually acquainted with physics and physiology, hygiene and economics, just as he becomes acquainted with ethics, politics, and jurisprudence. Law in every direction, as Butler said of the universe, is thus a scheme imperfectly comprehended; and to whatever department of science we betake ourselves, and whether we study that department with speculative or practical objects, the first lesson which we have to learn and to teach is a lesson of humility. We must be contented to know in part and to prophesy in part, and rejoice in the hope that as that which is perfect comes, that which is in part shall more and more be done away.

Such is the attitude towards objective and absolute law which
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science has imposed on Occidental thought, and in compliance with which dogma is being rapidly superseded by doctrine even in theology.

In politics and jurisprudence it is on the same ground that the philosophical point of view has taken the place of the theocratic, and that men have contented themselves to move gradually provided they move on.

In the East, both thought and action spring from an opposite point of view. Theocratic systems, like those under which most Asiatics, more especially those of Semitic race, have lived, and live now, resting as they do exclusively on the authority of direct external revelation, real or pretended, necessarily claim to be infallible, and, as they are assumed to embrace secular as well as sacred affairs, they are necessarily final. The only relation in which mankind can stand to them is that either of acceptance or rejection. There is no progressive movement, no gradual development, and a hard-and-fast line affecting every relation of life is thus drawn at once between the faithful and the unbeliever. If the unbeliever accepts the faith, no inquisitorial scrutiny need be made into the internal processes by which he arrived at it. External revelation will be charitably assumed to have reached him; and he may become a Pasha without going to the Confessional, or even being very constant in his visits to the Mosque. But the moment that he fails to give whatever external manifestations of his faith may be regarded as sufficient, there can be no compromise with him. He cannot be allowed to come to it gradually, or to accept it partially as it manifests itself to his understanding, or gradually takes root in his heart. He must receive it all at once, unhesitatingly and completely, on pain of being dealt with as the enemy of God. His only choice is Islam or the sword.

It was on this ground that I sought to explain, in my introductory lecture last year, the defects of the Corân as the basis of any political system which was to claim international recognition. The ethical creed by which the conduct of one Mahometan to another is regulated—with the rather important exceptions of polygamy and slavery—does not perhaps differ very essentially from the ethical creed which nature reveals to the rest of us. But the moment a Mahometan comes in contact with the external world, this creed not only ceases to act, but is positively reversed. "What was affirmative becomes negative, and what was negative becomes affirmative. The premises from which a Mussulman deduces his rules of conduct to an unbeliever are precisely the converse of those by which he deduces his rules of conduct towards a believer; and if he promises, by international treaty or otherwise, that his conduct shall be the same, he simply promises to violate the Corân." "It is in this consideration that we are to seek for an explanation, and even for a partial justification, of what we often talk of as the inconceivable obstinacy and bad faith of the Turks."

What I then said of the Corân I now extend to all theocratic systems, or systems resting on the assumption of an external revelation

of the positive laws by which God intended that the life of man should be governed in the shifting scene in which he has placed him. It is as true of Judaism, both ancient and modern, as it is of Mahometanism; and we find accordingly, that in announcing the principles in accordance with which the life of humanity was to advance, Christ, though himself a Jew, abandoned entirely the Jewish point of view. He declared the theocracy to be abolished; and alienated his countrymen, as he has done the whole Semitic world ever since, by preaching ethical discourses. It was to doctrine, not dogma, that he compelled them to listen, and if we desire to trace the spirit of his teaching elsewhere, we shall find it, not in the spurious revelations to which other branches of the Semitic race lay claim, but in the natural revelations of human consciousness, of which the Indo-Germanic race has always been more conspicuously the channel. The Vedic hymns, the Zend-avesta, the Damapada, the dialogues of Plato, and the ethics and politics of Aristotle, all more or less definitely foreshadowed the Sermon on the Mount, whereas the Corân, and, I fear, also the "Asian mystery," which we ourselves are striving to unfold, are in direct contradiction to it.

The progressive character which I claim for philosophical doctrine, as opposed to theocratic dogma, involving as it does the incompleteness of the former at each stage of its development, is regarded by what I may call the Anglo-Semitic school of politicians as so great a defect as to drive them to accept the "Arabs" as the sole recipients, and consequently as the sole expositors, of absolute law. Who these "Arabs" are is not very clear, for they are alternately made to include, and to be included by, the Jews, and are not always very sharply distinguished even from the Turks. But from Europeans, at any rate, they are marked off by a very tangible distinction. "God," we are told, "has never spoken to a European. —Never" (Tancred, p. 261). "Let men doubt of unicorns; but of one thing there is no doubt, that God never spoke except to an Arab" (p. 269). "That is the truth; the government of the globe must be divine, and the impulse can only come from Asia" (p. 293). And with a view to the realization of this divine government our own beloved Queen, who unfortunately is not an Arab, is to be "magnetized" and "persuaded to transfer her empire from London to Delhi, to found the greatest empire that ever existed"—and "to get rid of the embarrassment of her Chambers." I am far from pretending to determine the line which divides jest from earnest in these and similar expressions which continually recur in the brilliant fiction from which I have quoted them. No Scotchman, it is said, can understand a joke; and a dull old Scottish professor may perhaps be pardoned if he cannot see much fun in jesting which has already imposed taxes on Great Britain, our own fair share of which, if judiciously applied to the development of our higher schools and universities, would probably have made Scotland in a very few years the most learned country in the world.

But let us return from this involuntary digression into the for-

bidden field of "practical politics;" and if, not being "Arabs," we must not lay claim to supernatural enlightenment, try what we can make of the natural enlightenment which science may vouchsafe to us.

I have said that it is the incompleteness of the results of scientific investigation in jurisprudence and politics which begets in one class of minds a craving for mystical guidance, and I might have added that it is the same feeling which sends others, less imaginative but not more profound, to grope ignobly amongst facts and figures, without scheme or method, on their hands and knees. In international jurisprudence, above all, fanaticism and empiricism are alternately substituted for those honest and rational processes of observation and induction by which progress is made in other directions. Ethics gives place to mysticism or utilitarianism, right and might become the watchwords of opposing champions by whom their ultimate identification in Divine omnipotence is alike unperceived, rhetoric and declamation are substituted for logical sequence of thought and grammatical perspicacity of speech, and political discussion ends in vulgar and illiterate wrangling.

But is partial or incomplete knowledge necessarily unreliable knowledge? Can the security of no stepping-stone be trusted till the flood be past? Must the goal remain invisible till the race be run?

The distinction between incomplete knowledge and untrustworthy knowledge is very well understood in the physical sciences, and hence the unfaltering steps with which they march along from discovery to discovery. In physics and astronomy, in chemistry and physiology, in geology, botany, zoology, and even entomology, the unexplored regions cast no baleful shadow of doubt and uncertainty over the provinces which have been measured and mapped. Ascertained facts are not facts the less because there are facts behind them, or beyond them, which have not been ascertained, and solutions legitimately obtained are not invalidated by the existence of problems which are unsolved, and perhaps insoluble. All things, it is true, go out at last into mystery—mathematics and physics as well as ethics and jurisprudence. We can no more exhaust space, or time, or number, by thought, we can no more conceive either divisibility or indivisibility as ultimate, than we can explain the nature or origin of sin, or reconcile Divine omnipotence with human responsibility. But up to the borders of mystery science encounters within the sphere of material existence no obstacles which are necessarily insuperable, and no doubt attaches to the reality of her conquests. Can we, then, secure no such stable basis of operations as this for the progressive conquest of that individual and ethnological freedom of action, development, and expansion which is the object of politics and jurisprudence, national and international? Are there no ascertained, determined, and established routes in the field of social progress, that we can keep permanently open, and along which, without fear of surprise or obstruction, we may convey our material to the front?

Is it inevitable that, in international politics above all, the moment a change of relation manifests itself in point of fact—a progressive state, for example, gets ahead of a stationary or retrogressive state—every principle of human conduct, down to the most elementary rules of morality and material wellbeing, should be thrown to the winds, and the hideous spectacle be presented to us of soldiers and diplomatists executing a licentious dance of death over smouldering ruins and prostrate millions, in honour of some phantom doctrine of the Balance of Power, or the absolute independence and equality of States which never had a political existence except in the mutual jealousies of those who recognised them? Do motives of exclusive self-interest, jealousy, envy, suspicion, and fear—all that as individuals we brand as most ignoble—become worthy and generous springs of action simply by being transferred to a wider sphere? Is it enough to change the nature of things that men when dealing with nations should clothe with the high-sounding epithet of patriotism sentiments which, in dealing with each other, they would spurn with indignation and shame? When thus propounded in their nakedness these questions will not fail to call forth negative answers. But are these the answers which history gives to them, or which is given to them practically in our own day? I fear not; and did I hold the creed which so many thoughtlessly profess, did I believe international relations to be governed by no permanent laws, either moral or social, which were discoverable by human reason, I should abandon the study of international jurisprudence in disgust, as an occupation that was unworthy of a rational being or an honest man.

But such is very far from the belief with which the observations and meditations of many years have inspired me. I believe, on the contrary, and I think it can be shown so as to necessitate the belief of those to whom the reasoning is intelligible, that there are necessary and, as such, unchangeable conditions of the life and development of separate communities, just as there are necessary and unchangeable conditions of the existence and development of separate plants and animals: that these conditions are discoverable not only approximately but absolutely, just as the inevitable conditions of life and development in other departments of nature are discoverable: and that when so discovered and enunciated they determine the objects which international law must seek to vindicate in all its departments, and under all possible changes of relations which may result from the progress or retrogression of national life.

It is the presence of these unchangeable conditions and necessary objects which gives to jurisprudence in all its departments, and consequently in the department of international law, the scientific character which I have always claimed for it. The positive laws which result as conclusions from the premises with which this unchangeable element supplies us, are necessarily incomplete, because life, as I have said, is progressive in itself, and pro-

gressively revealed to us. But the premises themselves admit of being stated with as much precision, and, where the dicta of internal consciousness concur with the teaching of external experience and observation, are almost as unquestionable as the axioms of mathematics or the laws of thought. It is these invariable premises, coincident as you will find them to be at every point with Christian doctrine, that determine the lines along which the discovery of positive legislation, necessarily variable, must be prosecuted, or, to use language with which scientific jurists are familiar, it is natural law which prescribes the objects of positive legislation.

From these observations it will be readily inferred that the direction in which the system of international law which I shall here present differs from most of the text-books which have appeared since the school of Grotius terminated in the person of Vattel, is that it professes to be, not reasonable only, but reasoned. I am quite aware that this profession will expose it to the suspicion, and draw down upon it the ridicule, of those who arrogate to themselves the character of practical jurists, on the indisputable plea that they are not theoretical jurists. This consideration, however, I shall venture to disregard in virtue of another, viz. that though it be but too possible that, in my hands, scientific jurisprudence may fail to point the way to a realizable system of international law, that empirical jurisprudence, in their hands, has so failed already is a fact which I conceive to be established beyond all hope of contradiction.

The premises on which international law rest being common, as I have said, to jurisprudence as a whole, I must refer you for their detailed enunciation to the "Treatise on Jurisprudence as a Science of Nature," which forms the text-book to my lectures on natural law. But, at the risk of repetition, it may not be without its uses that I should here gather them together in a few brief propositions, and endeavour to exhibit them in the logical sequence in which, as it appears to me, they come into operation in international law.

1. *Fact is the source of right.*

The universe having been created by a power that is independent of man, and being governed by a power that is irresistible by man, must be accepted by man without question. The rectitude of its laws is thus an inevitable postulate, and fact and right, existence and the right to exist, in the last analysis are coincident. Ontologically this may or may not be so. That is a theological and metaphysical question with which the jurist is not concerned; but as a psychological dictum I believe it to be indisputable, and, in assuming its truth, I furnish, as it humbly appears to me, a sufficient answer, in logic at any rate, to the allegations of my learned colleague M. Brocher, to the effect that my system rests on the fallacy that "might makes right."

Against a system which assumes the necessary coincidence of might and right, the opposite allegation, that it is founded on the fallacy that "right makes might," would be equally just. Neither of these assumptions is fallacious, indeed, otherwise than as presenting one side only of the truth; and if the rights and the facts of existence presented themselves as phenomena equally tangible, I should be quite as well satisfied with the standing-point of Rousseau as with that of the Roman jurists. But rights, till their coincidence with facts is established, are mere opinions, the acceptance and rejection of which are equally legitimate; and hence the frequency with which systems which begin by declaring the rights of all men have ended by denying the rights of every man. The jurist has no mission to reconstruct the universe, however much pessimists may be displeased with it. As the apostle of order he must accept the inevitable, trace out and define the laws of its action in detail, and remove from before its relentless wheels the obstacles which they must otherwise crush. It is from this fundamental conception of jurisprudence as a whole that is deduced the fundamental doctrine of international law, the doctrine of the Recognition, *de jure*, of the Existence of the State, *de facto*.

By thus placing the doctrine of Recognition on an absolute basis—the basis, that is to say, of nature, or, as we say popularly, of the nature of things—we give to international law from the outset the character of a doctrine of rights, and get rid of all the nonsense that has been talked and written about voluntary concessions, imperfect obligations, and the *Comitas gentium*. There is no intermediate ground between right and wrong, without the State any more than within the State, on which human caprice can jurally disport itself.

2. *Fact is the source of duty.*

Duties differ from rights only in the point of view from which they are regarded—they are rights seen from the objective side. Every fact, then, which founds a right founds a duty which exactly corresponds to the right. In international relations, as in all other relations, the doctrine that rights and duties are reciprocal and co-extensive is thus an inevitable and unchangeable maxim, and as its logical consequences, it cuts off from the separate State the right of self-isolation, negatives the doctrine of absolute non-intervention, and gives both to public and private international duties the character of *debita justitiæ*.

3. *Fact is the measure both of right and duty.*

As water in a tube will not rise above its source, so neither rights nor duties can be carried by enactment, treaty, or any other contrivance beyond the facts in which they originate. International law can no more create a state, add to it, or diminish it, than it can create a man, or increase or diminish his stature. Be the state great

or small, strong or weak, international law takes it as the fact may be, and recognises it accordingly. This proposition negatives the doctrine of the jural equality of states which are in fact unequal, and lays the foundation for the first novelty which I have ventured to introduce into this system—the doctrine of Relative Recognition. When I speak of it as a novelty, I speak of course merely of its application; for it is neither more nor less than the old Aristotelian distinction between absolute and relative equality, which in its bearings on jurisprudence generally I have dwelt upon in the treatise to which I have already referred. But when applied to the doctrine of Recognition it becomes fruitful in results, and indicates the theoretical solutions of many problems which have hitherto been regarded as insoluble. In international as in national politics its practical realization is surrounded with difficulties which I am far from having the vanity to suppose that I have removed. But it is surely well to have indicated and emphasized a condition, hitherto overlooked, which is inseparable from a just appreciation of the relations of states, and the recognition of which would give to international organization a reality otherwise hopeless. Whilst conceding to the great Powers the preponderating rights which the facts of their greatness assign to them, it would save the minor states from the practical exclusion from international transactions to which they are doomed by the insincere recognition of jural equality, and enable them to vindicate for themselves the measure of influence to which they were entitled by the facts of their existence as separate international entities. The partial recognition of semi-barbarous Powers would cease to be the cruel and hollow farce which the pretended recognition of Turkey by the Treaty of Paris of 1856 proved to be. If quality as well as quantity, or mere extent of state existence, could be measured, states like China and Japan, which existing arrangements altogether exclude, might come gradually within the sphere of international rights and responsibilities. Half a loaf is better than no bread, and if the principle of recognition *quantum valeant* were admitted, states which had no claim to a bellyful might secure a mouthful. Even protected states and colonies, which for the present are incapable of separate political existence, might see their way to ultimate recognition.

4. *Perfection in relation, not in the subjects related, being the object of Jurisprudence as a whole, is the object of International Law as a portion of that whole.*

In this limitation of the sphere of jurisprudence, by which it is distinguished from ethics, we have the measure of the jural action and reaction of recognised states. It negatives, in their case, all interference with internal government, whether that government have reference to temporal or spiritual concerns. It forbids all propagandism, both political and religious, subsequent to and during

the subsistence of recognition. But it leaves wholly untouched such questions of fact as whether professions of communism, socialism, or Mahometanism, as immoral and as such anti-political, be or be not grounds on which recognition ought to be withheld or withdrawn, and states which profess them relegated to the position of international pupilarity. These are questions of politics, economics, ethics, and theology which it is the duty of statesmen to solve by the light of these sciences, but with which international jurists and international jurisprudence are not concerned.

5. Perfection in relation is freedom of separate action, not from but through the subjects related.

This principle on which the positive school of jurisprudence rests, finds expression as regards the relations of states in mutual obligations to aid in the adjustment of those relations in accordance with facts. To assert or develop its own freedom of action is the right and the duty of every separate community; and the relation which gives the fullest scope for the exercise of this right is the perfect relation between separate communities. To recognise this assertion and to aid this development is the duty and the right of all the communities which recognise their several existence as states. The freedom of each is the object of all, and considered simply as jural entities it is their only object. They are bondsmen to each other that all may be free, and, paradoxical as it may seem, freedom is thus a relation of mutual dependence. Absolute freedom belongs to God only, and is excluded by the conditions of creaturely existence, whether corporate or individual. But freedom being the end and dependence the means, and jurisprudence an ideal economist, the end justifies the means only to the minimum extent requisite for its attainment. This explanation supplies an answer, the adequacy of which, in principle at any rate, will not I believe be disputed, to the allegation which has been brought against my system by so eminent a critic as Dr. Bluntschli—viz. that it sacrifices the freedom of separate states. Its sole object, on the contrary, like the object of jurisprudence generally, is the vindication of their freedom up to the point at which freedom becomes suicidal.

Such then, in rough and hasty outline, is the discovered country of international law which the science of general jurisprudence has mapped out for us. From this natural Pisgah we can see that it is no floating mirage of human passions and fears, but a land of promise resting on Divine decrees more stable than the hills.

But what of its conquest? Along what lines are we to seek for the concrete realization of those inalienable rights and inevitable duties which God and nature have imposed on separate political communities? Now here, with Grotius and the elder jurists—in place of groping amongst innumerable transactions, dictated too often by motives of supposed self-interest, or at best of immediate convenience, in circumstances which can never recur, and many of

which, even with reference to the objects which they sought, were mistakes at the time—I have turned for guidance to a department of jurisprudence in which positive law has long been a reality in all civilized states, and tried to discover to what extent the example of its success might here be turned to account. I speak of course of municipal law.

It is quite true that the analogy between the *persona* considered as the municipal unit, and the State considered as the international unit, is an imperfect analogy. There are many directions in which it altogether breaks down, and any guidance which it seems to afford us must consequently be received with extreme caution. But all analogies are imperfect in this respect, and yet the whole of our reasoning from experience, which with the vast majority of us is the only reasoning of which we are capable, is reasoning from extremely imperfect analogies between past and present occurrences. The question is not, Are the conditions of the two problems the same?—for that may always be answered in the negative—but, Do they resemble each other closely enough for the old solution to be so modified as to apply to the new problem, or to suggest an analogous solution which may be applied to it? Now it was this question which the elder jurists asked themselves, more or less consciously and precisely, with reference to the new international relations which they wished to define and the old municipal relations which the civil law of Rome had defined already. Did the existence and development of the separate political entities which were springing up indicate the existence and progressive growth of jural rights and duties, in any degree corresponding to the rights and duties which centred in the *persona*, individual or corporate? Did the municipal law of contract find its analogon in the treaty engagements of states? Were the laws of occupation and prescription common to both spheres? These and similar questions seemed to them to admit of answers partially affirmative; and the realization of the doctrines of general jurisprudence was thus prosecuted to new results along well-trodden routes. No doubt these analogies were often assumed by the civilians to be closer than they were, and international law was hide-bound by the maxims and distinctions of Roman jurisprudence. It was long before the *jus gentium* expanded into the *jus inter gentes*. But the notion that, as in dealing with international relations they were still dealing with human rights and duties, the definitions which they had received in one class of relations might throw light on those which must be given to them in another class of relations, though differing considerably, was, I believe, a true notion. It is a notion consequently on which I have not hesitated to fall back. Whether in dealing with the normal or abnormal relations of states, its application will be found to be the chief distinction, in point of method, between the present treatise and most of those which have appeared in recent times.

But whatever might be the value of this proceeding within the

sphere of science, the question whether or not it could help them in the sphere of practice remained unanswered. It might serve as a guide to the realization of abstract and unchangeable principles in concrete and fluctuating conditions, in so far as definition went; but could it suggest any means by which these definitions could be rendered authoritative by general acceptance, and measured out and enforced in special cases? Did the municipal factors of legislation, jurisdiction, and execution suggest any corresponding factors in international jurisprudence? To this question, on which the character of international law as a positive system in the ordinary sense really depends, a few hardy speculators, in an irregular way, ventured to return an affirmative answer. But the response of the jurists was, and for the most part I believe is still, negative. A feeble substitute for these potent jural factors has no doubt been attempted to be found in the modern doctrine of arbitration. But arbitration, in its municipal sense, assumes the presence of the executive factor of government at all events; whereby the decree of the arbiter may be converted, if need be, into the judgment of the Court. International arbitration with no such resource was thus outside of the sphere of positive law in the municipal sense, and though I still regard the question of the possibility of international legislation, jurisdiction, and execution as *sub judice* even in a speculative sense, I have insisted on the necessity of striving to found institutions by which corresponding functions shall be performed as the condition *sine quâ non* of the realization of a system of positive international law. With the object of illustrating my views, rather than of offering practical suggestions for carrying them into operation, I have even gone so far as to elaborate a scheme by which, if realized, this object, as it seems to me, would be attained. This portion of my work having been published in French, under the title of "Le Problème final du Droit International," has called forth some generous and indulgent criticisms abroad, for which I take this opportunity of thanking my distinguished colleagues of the Institute of International Law. Foremost in this, as in all other efforts for the advancement of international jurisprudence, is our venerated father, Dr. Bluntschli, who has published three remarkable articles in the *Gegenwart* (Nos. 6, 8, 9, 9th and 23rd February and 2nd March 1878), on the organization of the union of European States (*Die Organisation des europäischen Staatenvereins*). In the general views for which I contended, I am gratified to find that I have Dr. Bluntschli's concurrence.

He admits, 1st, the impossibility of conferring on international law the character of a positive system, otherwise than by the action of factors more or less closely corresponding to what, in municipal law, we call legislation, jurisdiction, and execution.

2nd, that the realization of these factors within the sphere of international relations, is not necessarily or permanently shut out by any facts or laws inherent in the character of these relations.

3rd, that the failure of all previous schemes of international organization can be satisfactorily explained by their aiming at two impossible objects: (a) The establishment of international arrangements which should be immutable, and (b) the political equalization of recognised states, whether with or without their equalization in fact.

As the basis of his own scheme, Dr. Bluntschli frankly accepts the *de facto* principle, which lies at the root of the doctrine of recognition. As to the soundness of this principle, there is, I believe, now no difference of opinion amongst jurists of any account; but in carrying it out, as the fundamental principle of international organization, and thus breaking with the revolutionary schemes which he criticises, Dr. Bluntschli has had as yet few predecessors. For the most part, it is no sooner stated than it is departed from; and hence the feeble and illogical character of the vast proportion of works of all classes in this branch of jurisprudence.

4th. Dr. Bluntschli further recognises the necessity of conforming to modern conceptions of liberty, by taking account of public opinion within the several states by means of representatives chosen by or from the various municipal legislatures. He thus throws in the weight of his great authority against secret diplomacy, and all other devices for the realization of personal government in international affairs.

So far, I believe, I have the concurrence of my eminent colleague, and it goes pretty nearly all the length that I care for. I did not expect him to accept the scheme which I propounded, and I am consequently not much moved by the allegation that I have dreamt the English Constitution, or rather, as he alleges, the constitution of the United States; whereas he, not unnaturally, prefers to dream the German Bund. It is very improbable that either of them will be found to offer a model which will admit of any close imitation in international relations, but the former has surely as good a municipal pedigree as the latter to recommend it. On the practical branch of the subject I am far from wishing to dogmatize. That I shall gladly leave in the hands of the "one or more great European statesmen" who, I am glad to learn from Dr. Bluntschli, are not indisposed to undertake it; and I shall only be too well pleased if any poor suggestions of mine should contribute to aid them in their labours.

" But all these things I must as now forbear;
I have, Got wot, a largë field to ear;
And weakë be the oxen in my plough."

The question raised by the 4th proposition, whether the external politics of states shall be governed by their executive or legislative factors, demands, however, some farther mention at the present moment. Strictly speaking, it is a municipal, and not an inter-

national question; yet so inextricably are these two branches of jurisprudence intertwined, that it is a question which threatens, perhaps more than any other, to divide international politicians and jurists into two hostile camps. In the formal conduct of international affairs, it has always and everywhere been the executive which represented the state, and proclaimed what was held to be the national will to the external world. But substantially the question whether, in the performance of this function, the executive acted independently of the legislature, or was simply its mouthpiece, depended on the form of the municipal government of the state. In despotic states, where the legislative and executive factors were centred in a single individual, that individual, personally or through his representatives, spoke directly in his own name. He was the state both legislatively and executively, and what he said the state said, no matter in what capacity he spoke. It is true that the independence of his will was proximate only, not ultimate, and the frequency with which it was controlled by revolutions has always rendered it an unsafe basis for international trust. It is on this ground that in treating of the doctrine of Relative Recognition, I have ranked despotic states lower than constitutional states. Still, when a despotic state has once been recognised, there is no international ground on which its executive, though unsupported by its legislature, can be repudiated as the exponent of its will, and treaties have consequently been not only negotiated but ratified without receiving the sanction, or being brought to the knowledge of any separate legislative factor. In constitutional states, on the other hand, the executive being dependent on the legislative factor was supposed to speak its words, and these words, from the representative character of the legislative factor, were supposed to be the ascertained will of the nation. The will of the executive was the will of the legislature, and the will of the legislature was the will of the people, and in dealing with a constitutional government external states thus dealt with the nation in its organic totality.

A third doctrine has recently been attempted to be introduced by which the same state may be at once a free state and a despotic state, according to the point of view from which it is contemplated. Whilst its municipal affairs are governed constitutionally, or rather democratically, its international affairs, it is contended, may be, and ought to be, governed despotically. This doctrine, known by the names of Cæsarism, Imperialism, or personal rule, inasmuch as it can scarcely ever be in accordance with fact, can scarcely ever merit the acceptance of international jurisprudence. Even in a state in which the executive or legislative functions are professedly united in a single will, that single will is ultimately dependent on the collective will. But where this collective will can make itself felt externally only as the result of a domestic revolution, the executive is independent in a very different sense from the executive of a state

which is furnished with an elective system the very object of which is to control it. The will of the Czar may to some extent no doubt be influenced, even immediately, by the will of the Russian people, but it is controlled by no constitutional power like that which at any moment may dismiss an English Prime Minister from office, and which, at stated periods, brings his tenure of it to an end.

If I am asked whether I believe that a cosmopolitan organism, even if realized in accordance with the immutable laws which govern human relations, and so adjusted as to take cognizance of and adapt itself to ever changing conditions, would continue to be self-acting, and that the course of this world's history would thenceforward run straight? I reply emphatically, No! All that I claim for such an organism, or for any distant approach which might be made to it, is that a wider margin would be thereby reclaimed from the action of those disturbing forces of human passion, selfishness, vanity, and stupidity, the presence of which we must accept as not less permanent than the laws which they violate, or the facts against which they dash themselves. When we speak of man as a rational being we use an expression which we know to be only partially true. But man is not wholly irrational, or entirely bereft of what reason he possesses as a citizen when he deals with interests which transcend the limits of state existence; and I consequently see no ground for doubting that what his partial and fitful reason has accomplished in municipal jurisprudence may be gradually accomplished in international jurisprudence. Extravagant hope is as inimical to steady and orderly activity as groundless discouragement, and it is hard to tell which of the two has acted most prejudicially on the progress of international jurisprudence. After ages of honest, and on the whole intelligent effort, the freedom of the individual has as yet been only very imperfectly protected from the inroads of despotism on the one hand and anarchy on the other; and it is vain to hope that the freedom of the state can be secured by a single spasmodic throe of international reason. But if it cannot be accomplished by reason at once, it cannot be accomplished without reason at all. Reason, which in the last analysis is identical with power, is the ultimate factor into which all the proximate factors of progress resolve themselves, and in this consideration we have, I think, a sufficient warrant for our faith in a reasoned as opposed to a haphazard system of international law.

ON THE TAXATION IMPOSED UPON SUCCESSIONS TO PERSONAL AND HERITABLE ESTATE.

It is somewhat remarkable that while attention has been directed very closely of late years to imposition of taxes, and while efforts have been made to render these necessary burdens equal for all classes in

their incidence, one class of taxation, that upon successions, has passed, if not unnoticed, at least with but slight observation. Yet the payments made under this head present, we venture to say, more anomalies, more actual injustice, than all the other fiscal peculiarities of our system put together. With the upas-tree of the Income Tax there has grown up a fashion of exempting from certain burdens certain among the poorer classes of our fellow-citizens. The idea is that taxation should fall more upon those who reap the greater benefits of that wealth and these advantages from which such taxation is inseparable, at least we must conclude that some such principle is at work when we see exemptions in favour of small incomes carried further and further, and almost used (as in the olden days of now extinct empires) for political ends, and to make political capital. All such policy, we venture to think, is wrong; the principle of exemption is in itself a bad one, and operates injuriously even on those whom it is meant to benefit. What, then, shall we say to a tax where a similar exemption exists, not in favour of the poorer citizen, whom we seek from a feeling of perhaps false economy to relieve of his burdens, but in favour of the rich, both in lands and in personal estate? These duties on successions give us an example of this very exemption in favour of a class—and we will endeavour to show how the burden operates, and where it galls by its injustice.

There are, of course, upon the succession to heritable and to personal estate three separate kinds of duties. In the case of heritage we have what is termed the Succession Duty, and in the case of personal property there are two, called respectively Inventory (or Probate) and Legacy Duty. Now let us examine the history of these duties, and, above all, the mode in which at present they are imposed. Taking, then, first of all the Inventory Duty, and inquiring into its history, we find a respectable antiquity of nigh 200 years. In those early times it was *nominal* and *casual*, that is to say, its amount was but five shillings on all estates over £20, while it was raised only "for four years towards carrying on the war against France;" but, like many of its later brethren in the world of taxation, the impost, at first temporary and slight, became soon permanent and heavy, and a scale of duties came ultimately to be fixed, which in 1859 attained its present limits. The history is a very brief one, but, like the history of all such duties, is significant in two ways, for it tells the tale of prosperity on the one hand, and of the exigency of the times on the other. We raised the tax to carry on a war, but we found it so profitable that we stuck to it in time of peace, and it has risen and risen in value so much as to become an incubus of which we may never get rid.

Now there are, we maintain, several very serious objections to this duty, not in itself, but to the manner in which it is imposed. Let us consider these somewhat in detail. In the first place, bearing in mind that it is a tax levied on moveable property only

we find one remarkable and extraordinary exception to this general rule. When lands or buildings have been purchased for the purposes of trade with the capital of a partnership, they are liable in the duty. Why is this so? Why tax trade and commerce, the very vitals of the country, and not tax in equal degree the land-owners, or rather those who succeed to heritage. From a pamphlet on this subject, very ably and carefully prepared, we extract an example of how the probate and other duties would operate in two cases of succession to £50,000, where in the one instance the succession was heritable, in the other equally heritable in law no doubt, but in the eye of the tax-gatherer "partnership capital used for trade purposes." Here is the example given in the words of the author of that pamphlet:—

"A. is the proprietor and sole occupant of real or heritable property worth £50,000, and yielding $3\frac{1}{2}$ per cent. per annum, or £1750. B. and C. are in partnership as merchants or manufacturers, and are the sole occupants of lands and buildings which have cost the copartnership £100,000. A. and B. die intestate, leaving sons D. and E., aged thirty-five.

"D., the son of A. the landed proprietor, pays on his £50,000 of land succession duty to the amount of £275, 12s. 0d.

"E., the son of B. the merchant, pays on his £50,000 of the business lands and buildings the following duties:—

"1. Probate duty . . .	£1125	0	0	} £1625 0 0."
"2. Legacy duty . . .	500	0	0	

That, we think, is enough to show how the matter really stands as regards this objection to the probate duty. No doubt the writer of the pamphlet referred to put his case in the best light; for instance, he takes a high rate of return for the land, such as few landowners contrive to get, and he says nothing as to the large profits made in mercantile concerns, and only puts down what the lands and buildings have "cost" the partnership. As we are not seeking to put the case from one point of view above another, it is sufficient for our purpose to point out the marvellous difference between a duty of £275, 12s. and of £1625, on the same succession. Making every allowance for large profits in the one case, and small returns in the other, we cannot account for a rate nearly six times larger on the merchant. What the particular property (whether it be land in its simplest sense, or land and buildings in the sense of the Act) will bring in the market is the true test. Let us have the duty so apportioned that its incidence will be upon the true market value in every case, whether the property be used for trade or not. Indeed, to speak of lands and buildings being used for the purposes of trade is almost an absurdity if it be closely looked into, although we are accustomed colloquially to use the expression. A landowner when he lets a farm enters into a commercial transaction with his tenant just as much as a shopkeeper who sells a pound of tea on credit,

or a merchant who orders a bale of cotton for his manufactory; the basis of the distinction drawn in these duties is a false one, and lies in a misapprehension of the true conditions of commerce. We must necessarily, in these observations, be understood to have spoken only of lands held in fee-simple, because it is clear that the interest of the institute under an entail, though by law regarded as the possession of the fee, in actual practice exceeds very little, if at all, the value of a life interest, the right to growing timber being perhaps the most important difference in favour of the entailed proprietor. It may further be noticed that when the distinction between heritable and moveable property was first set up as to this tax, a much larger number of estates were entailed, and the rules of entail were much more strict than they have since been rendered.

But we have said enough probably to show the force at least of this first objection, and may pass on to another and most serious fault presented to us by this tax, and that is the mode in which, even as regards personal property itself, the levy is made. Instead of adopting a uniform plan, and saying that £2 or £3 per cent., or indeed any fixed sum, should govern the amount of the impost always, an arbitrary and utterly unreasonable scale has been fixed in which those estates which are smallest pay most, or in other words, the poorer a man dies the more his representatives have to pay as inventory duty. There are two causes which lead to this anomaly, the first is, as we have indicated, that instead of a percentage rate the amount of the duty is fixed at certain points in a scale, the consequence of this being that all estates above one point and below the next point pay the same duty, to the manifest loss of revenue, and gain for the exempted estate. To take an illustration: the estate of a testate person, where the value is £1000 and under £1500, pays £30, that is to say, the same duty would be received by the Exchequer for £1000 and for £1499. This is a very moderate example to make use of. What can be said when we come to larger sums and find that £119,000 pays the same duty as £100,000, or that £199,000 pays the same as £400,000? The falsity of the principle is seen at once; to be just we must necessarily adopt a system of percentage charge, which upon all estates will fall with equal weight. These very illustrations, however, lead us to another objection, to the duty as it is at present imposed. The scale not only goes forward in leaps so as to make the burden unequal, but as the value of the estate rises the rate of the duty falls. This is a peculiar feature of the tax. When the estate, for instance, is only £1000 in value the probate duty is £30 in cases of testate succession, and it might naturally be supposed that with £30,000 the same duty would be thirty times more, or £900, whereas in point of fact it is only £450; or, putting the same figures in another shape, the sum of £30,000 when it forms one estate pays a certain duty, but if it formed thirty

estates of £1000 each the cumulative duty paid by these thirty would be just double of what is paid by the single estate. We have quoted but one example to avoid multiplying figures and statistics, which however satisfactory as a matter of proof, cannot beyond a certain point be very interesting; still that one example shows how the matter stands. In a word, not only do we at present adhere to the principle of scale, itself unjust and injurious to the revenue, but we further intensify the evil by rendering the burden a lighter one as the scale rises. This question as to probate duties especially, but indeed as to succession duties also, was brought under the notice of the House of Commons as recently as May last, when one of the speakers expressed surprise that so important a question had been suffered to lie dormant for twenty-five years, at least so far as the House was concerned, the previous discussion having taken place in 1853, and at that time it was admitted on all hands that the whole question of these taxes required revision and reform. We cannot refrain from here quoting a few sentences from the speech of Mr. Baxter, M.P., made in May last on this subject. He says: "I will just take the instance of the probate duty. Now, why probate duty should be levied on a higher scale on a small sum than on a large one, why territorial estates and landed property should get off scot-free while personal property pays the tax, and why premises employed in trade should pay a tax while lands and buildings not so employed should be exempted, I must say are things which have always passed my comprehension. Surely there is a *prima facie* case made out in favour of all kinds of property being taxed in the same way, and at all events cogent and valid reasons ought to be given for maintaining the existing state of things. At present no such reasons have been stated, nor do they in my mind exist. I entirely concur in the remark that it is extremely improper that any favouritism should be shown in matters of taxation. It is not only improper, but it is dangerous to the best interests of society, when that favouritism is shown to the richer and more powerful classes. I have been often surprised that successive Chancellors of the Exchequer have not dealt with this subject long ago, because we lose by our present system a very large amount every year to the public revenue." Mr. Barclay, M.P., who indeed originated the discussion, also spoke of the anomalies as to this duty to which we have already referred.

Before we pass on to the peculiarities of the legacy and succession duties, there is yet one other point to which we devote a brief attention, and that is the mode of collection and of charging this inventory or probate duty in Scotland. If the object be to create complication and difficulty the present plan is effectual, while it is also expensive for the Government. Those who are well off can afford to pay lawyers and get the thing done without trouble to themselves, but it is very hard that a similar expense should be entailed upon the poor. Let us hear what an experienced man, himself a solicitor, has said as to this: "The duty must be paid by the executor before

he enters upon the possession or management of the estate. In Scotland it is charged on the *whole* estate without deduction of debts, but a return is allowed on proof of the constitution and payment of debts. This system involves greater expense and trouble than the simpler and more equitable mode in use in the other parts of the kingdom. The labour and cost of establishing the claim for a return of duty are frequently so great as to preclude the application, and thereby to cause heavy loss to families very unable to bear it. The Government are therefore frequently allowed to retain duties to which they are not entitled. The legacy duty, which is another tax upon successions to personal property, is not payable until the residue is ascertained, and it was never intended that the probate duty should be imposed on anything more than the clear estate. It is quite contrary to the principles of taxation that the same estate should be subjected to two taxes, collected in different ways and at different times. The probate duty should be merged in the legacy duty, and both paid as one tax when the residue is ascertained.

"A father dies intestate, leaving funds to the amount of £1000. His son, as executor, in the first place pays probate duty thereon, amounting to £45, and debts amounting to £200. In the second place he produces to the Revenue officials vouchers in proof of the constitution and payment of the £200, and then pays them £8 of legacy duty, being at the rate of £1 per cent. on the clear residue of £800. In the third place, he thereafter makes out a claim for return of probate duty in respect of the debts, and in proof of the constitution and payment of the £200, *he produces for the second time the vouchers which were exhibited and held as sufficient when the residue was fixed by the officials at £800*, and the receipt granted by them for the legacy duty of £8. There is no need whatever for any claim for return of probate duty. If an estate amounts to £1000, and there are debts paid to the amount of £200, the residue account of £800, as adjusted with the officials, should be held sufficient to authorize repayment to the executor of the probate duty paid by him on the £200 of debts."

We would go to the full as far as this, and above all, think that this cumbrous system of return should be at once abolished. Fix your tax or duty, if duty there is to be, and then, according to what we believe is the English system, the duty can be ascertained upon the declared estate, less the debts. There are, according to the present system, two duties, payable at different times and in quite a different manner; the duties may be made one, and the period of payment fixed by reference to the date at which the net value of the estate has been ascertained.

There is, again, the difference which is made between testate and intestate successions. The latter have to pay a considerably heavier duty. Why, it may be asked, should this be the case, and upon what theory can its continuance be maintained? We are told that it is intended to induce those who possess property to indicate dis-

tinctly those to whom they wish it to go. But the answer is manifest. If they die intestate, the law itself has made a will for them, and there may be, very likely is, no reason for believing otherwise than that they did not wish to disturb the succession as laid down by law. Rather, we suspect, must the credit or discredit of the peculiarity in the tax be given to lawyers, who thus encourage not the least lucrative branch of their business, the preparation of wills. As the landed interest was strong enough to exempt land from the operation of the duty, so the legal interest was strong enough to insert a provision eminently suited to aid legal business. It may not have been so in either case, but the opportunity was tempting, and the result certainly not free from suspicion. There is, however, an excellent reason, apart from all this, why the estates of persons dying intestate should not be more heavily mulcted in these duties than where a will has been left, and that reason is, that in these cases of intestacy there is an executor appointed by law, and the Government is even more sure of securing its dues.

The return made by order of the House of Commons, and printed in February 1878, shows that on an average of the whole estates the percentage of inventory duty paid was £1, 14s. 6d., while a like average of all estates under £30,000 gave a percentage of £1, 19s. 2d. Now, under the present and varying scale of rates, £2,260,176 was the total raised. Had the rate been fixed at the percentages suggested by either of these averages in the returns, say at £1, 15s. or £2, the country would have gained roughly nearly £35,000 in the one case, and nearly £363,000 in the other.

Briefly to recapitulate our objections to the inventory or probate duties, they are as follows: *First*, It is levied only upon personal property, with an exception as against heritage when used for the purposes of trade, creating thus at once an exemption in favour of land, with an exception directed against commercial undertakings. *Second*, The tax is levied upon a sliding scale instead of by a fixed percentage, by which means large sums of money escape taxation as being above one step in the scale and below the next. *Third*, Even the scale as at present adjusted is not fixed in its rates, which do not increase in a proper ratio, thereby imposing a heavier burden on the smaller estates. *Fourth*, The mode of collection and granting return of duty is expensive and unnecessary. *Lastly*, The distinction made between the duties in cases of testacy and intestacy is not an equitable one.

Turn we next to another of the taxes levied on successions—legacy duty. This has not the objectionable features of inventory duty, because it is uniform and impartial, though it varies in amount according to the degree of relationship. The first time this tax was imposed was in 1780, and by the year 1815 it had attained its present rates. So long ago as 1796 a proposal was made to extend the application of this duty to heritage, and that proposal, though it emanated from Mr. Pitt, met with such opposition that it was abandoned. In this, then, consists our objection to the tax as at present

levied; but that objection was partially removed in the year 1853, when an extension of the duty to heritable property was made, the name of succession duty being given to the new tax. Vehement was the opposition to the change: one speaker in the House went so far as to prophesy that at no distant day the Government would be forced to undo what they had done in "obedience to the unanimous demands of an indignant nation." We have not, however, yet heard of the indignation or of the unanimity of the call for repeal, though twenty-five years have passed since that prophet arose. When Mr. Gladstone introduced the measure he made an observation, now historically interesting and important, to the effect that considerations of equity called for a change in one of two directions—either there should be a repeal of the duties payable on moveable property, or else the duties payable on the death of the owner should be extended to every kind of property whatsoever. Now, what has really to be done is to calculate the value, not of the estate itself, but of the life-interest of the person succeeding to it; the true test, what will it bring in the market? is not applied to heritage (with the exception as to inventory duty above mentioned). Thus, for instance, a man of fifty succeeding to the fee-simple of a heritable estate, worth £20,000 in the market if sold, only pays duty on the value of his life-interest, although he might the very day following realize that £20,000, on which he must have been much more heavily taxed had his predecessor thought fit to put his means in another shape than that of land. The results, as compared with all the duties, are put very well in the following example taken from the pamphlet already referred to:—

I. Heir of entail or other bare liferenter, aged fifty, succeeding father in heritable property, yielding a clear annual rental of £4000, and worth thirty years' purchase or £120,000.

The life income or annuity is estimated at about £49,700, and the succession duty thereon at £1 per cent. is £497.

II. Heir in fee-simple or absolute proprietor.

His life income or annuity is estimated in the very same way, and the succession duty payable by him is also . £497 0 0

Whereas if it had been paid at £1 per cent. on the real value of the estate, or £120,000, it would have been . 1200 0 0

Difference in his favour £703 0 0

Again, contrast the latter case with one of personal property of same amount:—

Probate duty on £120,000 of testate personal estate	£1800 0 0	
Probate duty on £120,000 of intestate personal estate		£2700 0 0
Legacy duty in both cases at £1 per cent.	1200 0 0	1200 0 0

£3000 0 0	£3900 0 0
497 0 0	497 0 0

Succession duty as before .

Differences in favour of heritable property	<u>£2503 0 0</u>	<u>£3403 0 0</u>
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"Whether a man," says Mr. McCulloch on Taxation, "vest his fortune in money or land is his own affair. When Government impose taxes on its transfer from the dead to the living, its duty is plain and simple—to ascertain the amount to be transferred, and to impose on it the same rate of duty without regard to the form or way in which it may be invested. To exempt land and freehold property from such duties is plainly an abuse." Where, of course, the position of the holder of the land is that of a liferenter, or indeed of an heir of entail, matters are very different. The power of alienating the capital invested, that is to say, of selling the land, is withheld, and the sole interest to which the liferenter has succeeded is the right to the rents during his life. To compute these on the existing system is perfectly equitable. There is also a feature in the payment of these succession duties which might advantageously be extended to personal as well as real property, and that is the privilege of making payment of the tax not in one lump sum, but in several portions spread over a period of time. For heritage at present there are allowed four years, and the instalments are paid half-yearly. Were such a method adopted with reference also to moveable property, it might relieve the pressure of a heavy payment at a time when other heavy calls also fall upon the estate, and the Government might be secured in its rights by priority of claim, while a moderate rate of discount would serve to encourage payment in full from those who were able to make it at once.

Now, to turn as shortly as possible to the results of the existing system upon the national Exchequer, we find that from 1859 to 1869 inclusive, the probate and legacy duties together in England just exceeded $31\frac{1}{2}$ millions, being nearly $14\frac{1}{2}$ millions for the former, and above 17 millions for the latter, while for the same period landed property only paid a trifle over $5\frac{1}{2}$ millions. In Scotland for the same period the probate or inventory duty yielded over $1\frac{1}{2}$ millions, and the legacy duty almost exactly $1\frac{1}{2}$ millions, in all together about $3\frac{1}{2}$ millions, while only £575,345 was produced by the succession duty. Lastly, from the recent Parliamentary return we learn that while for 1876-77 the two first duties yielded £5,107,130, the last only gave to the tax-gatherers £849,340. But enough of these figures; they show sufficiently that personal property pays six times more than real property. We must not, however, be carried away at once by this mere statement of an undoubted fact, for there are several considerations which lead to the conclusion that any change would still leave the land as a less lucrative source of revenue. The real property in the country, in the first place, is probably of considerably less value than the personal property. Again, even under an altered system, all entailed estates, so long as they remain entailed, would only pay on the life-interest of each succeeding heir under the tailzie; and then, above all, land is more subject to descend in

the direct line than other kinds of property. Be these facts, however, as they may, the existing principle is wrong, and needs change: if the revenue is to benefit, so much the better; if not, at least we shall have a mode of taxation intelligible in its method and impartial to all; and should there be the necessity for any increase, the incidence of the additional burden would fall evenly and justly.

But when a change is made upon the system under which any large portion of taxes is levied, we require not only to remove existing anomalies and exemptions, but also to use every effort to improve the modes of collection and the regulations regarding the duties. For instance, with these succession duties, a very useful and important change might be effected as to the time within which any claim for the duties may be made. At present it is said, perhaps not altogether without some degree of truth, that when a slack time comes in the Government offices of this department, the unemployed clerks are set to work to rake up all or any old claims against the estates of persons long since dead. Indeed, at no very remote time, such a claim was insisted in against the representatives of a former President of the Court of Session, now at least in the third degree of descent. This appears to us a very bad system. If there was duty to be paid it should have been claimed at once, for there was no attempt to conceal funds or deny liability, and a prescriptive period ought for the sake of all persons to be fixed, after the expiry of which no claim, unless founded upon a specific allegation of fraud or wilful misrepresentation, shall be valid. Of course, where deceptive evasion has been attempted, not only the duty should be exigible at any time, but if discovered the offender should suffer heavily; but that does not affect such cases as those we have alluded to. The reduction of the enormous staff of officials engaged in the collection of these duties would be vastly increased were it possible to remit altogether the one per cent. duty payable where children succeed their parents. No doubt such a change as this would be very extensive in its effects, and the loss of revenue could not fail to be considerable, but then we venture to think that the expenses might be proportionately diminished. The department practically would be abolished, and might be thrown into some other branch of the public service. We are making inquiries with a view to ascertaining somewhat in detail what the collection of these and other duties costs the country, and the results when put into shape may perhaps prove interesting; at anyrate we venture to think that they will prove that relatively to its results the collection of these duties on succession costs a very high percentage. It would, however, we think, pay the Government, and pay it well too, (1) to annihilate the one per cent. class in the case of legacy duty; (2) to do the same as to succession duty; but, on the other hand, in the case of the other classes, paying three to ten per cent., to charge the tax upon the market value

of the land bequeathed or succeeded to; (3) to extend the inventory duty to land, and fix it at a certain percentage rate. Taking the loss and gain and putting them one against the other, we should see by such a change (1) a loss in all cases where children succeeded their parents in moveable estate; (2) a gain whenever land passed otherwise than from parent to child, varying from three to ten per cent. on the true market value, and not on an estimated life-interest; (3) a gain upon the inventory duty as extended to land; (4) a gain upon the percentage rate fixed for the inventory duty in the case both of heritable and of moveable property; (5) a gain by the large reduction in the expenses of collection. We hope, however, to give hereafter from the actual statistics what would be the probable result fiscally of such a change.

That a change in the mode of assessment for these duties, and we hope also in the mode of levying, is imminent no one can doubt, and accordingly it is especially incumbent upon the legal profession to see the new duties based upon sound principles, and also to endeavour to secure the adoption of such a method of collection as will ensure the simple and prompt settlement of claims.

THE ROYAL BRITISH BANK CASE.

THE Royal British Bank stopped payment on 3rd September 1856. The liabilities were £700,000; the available assets £300,000. Thereafter the directors were, along with the manager, tried on an indictment for conspiracy. The information charged that the defendants, "intending to deceive, defraud, and prejudice such of the shareholders as were not aware of the true state of the bank, and to induce the Queen's subjects to become customers and creditors of the bank, and to purchase and hold shares therein, did conspire falsely and fraudulently to publish and represent that the bank and its affairs had been, during the year ended the 31st of December 1855, and then were, in a sound and prosperous condition, producing profits divisible among the shareholders, they, the defendants, well knowing that the bank and its affairs had been during that year, and then were, in an unsound and unprosperous condition, not producing any profit divisible among the shareholders."

On the 15th of July 1856 the directors made a report to the shareholders, in which they declared a dividend of 4 per cent., and at the same time issued 500 new shares in the bank. An abstract balance-sheet for the last half-year was at the same time issued to the shareholders, which purported to exhibit the liabilities and assets of the bank, along with the profit and loss account.

At the trial, which took place in February 1858, seven special charges were made against the directors in support of the accusation of conspiracy. These were—(1) Publishing a false report for the

half-year to December 31, 1855, declaring a dividend of 6 per cent. (2) Issuing new shares, knowing the bank to be in a failing condition. (3) Publishing a balance-sheet, false as to the amount of assets, the provision for bad debts, and the profit and loss account. (4) Paying a dividend when no profits had been made. (5) Buying the bank's shares with the money of the bank in order to keep up the price. (6) Publishing a circular, to induce shareholders to buy new shares, in September 1855. (7) Publishing an advertisement inviting accounts when the bank was nearly insolvent.

The balance-sheet issued to the shareholders for the year ending 31st December 1855 was correct in form, and showed that the bank was in a sound condition, and that there were profits upon which a dividend of 6 per cent. could be paid. But the evidence clearly proved that in point of fact the bank had realized a loss, and could not meet its engagements. Of this fact the directors were aware. The way in which the books were manipulated was this: on the credit side, under the item "loans on convertible securities for short periods, advances on cash-credit accounts, bills discounted, etc.," were included debts due to the bank which were known to be bad. No intimation appeared on the balance-sheet that these debts were not available, or that other large debts included in this item, for which the securities had become inadequate, were not available. Thus a surplus was made out which, had it been genuine, would have yielded a dividend, whereas, on a true statement of the affairs of the bank, there was no surplus from which a dividend could be declared.

The trial occupied a fortnight, and a great mass of evidence was produced in support of the charge of conspiracy. As to the actual facts regarding the question of solvency and insolvency, the financial position of the bank, the value of the securities held, the amount of liabilities, and the manner in which the balance-sheet had been made up, there could be no doubt. In almost every such case, however lengthy the investigation may be, the results are simple enough. The books speak for themselves, and patient inquiry cannot fail to unravel the truth. All along the directors and manager hoped that the affairs of the bank would ultimately come right. "What are our prospects of business to relieve past disasters?" wrote one director to another, "Do they justify going on, even supposing the charter would warrant our doing so? for, as respects an appeal to our shareholders, to state losses, and obtain their acquiescence to relinquish dividend, and whip up to restore lost capital, I should pronounce it at once simply puerile, and the most certain and ignoble course of official suicide." At an examination into the affairs of the bank, previous to the criminal trial, one of the directors said, "We were buoyed up by hope that by issuing new shares and increasing our capital, the losses would be made up, and that we might avoid realizing the ruin which a more explicit statement would immediately have brought down upon the shareholders."

The position of the directors was simply this: having made a series of bad speculations, and having received, some of them, heavy advances from the bank for their own private ends, they found the bank rapidly getting into difficulties. Unwilling to acknowledge this fact to the public and the shareholders, they held on, always in the hope that matters would be extricated. At last the position became desperate, and a series of balance-sheets were framed for presentation at the shareholders' meetings, in which, under the head of assets, were included securities good, bad, and indifferent alike. By this means an apparent surplus was shown, whereas, had the actual state of affairs been revealed, had bad debts been counted as losses, and unrealizable securities been put at their proper value, a deficit would have appeared.

The Court held that, in order to obtain a conviction, it was not necessary that directors should be cognizant of the transactions which led to insolvency. It was enough if they were aware of the result, and concurred in the representations in furtherance of a common design, even although they did so with no motive of particular benefit to themselves.

The evidence disclosed dealings of a very loose description. The bank appeared to have got into the hands of speculators, who used it for the purpose of obtaining advances. Gwynne, one of the original projectors of the bank, opened a cash credit in February 1856, for £3000, with a promissory note. Next year he had a credit for £5000, on a bill. In the end he owed the bank £12,000, on worthless securities. Brown (one of the defendants) became a director in February 1853. On the 16th of March he had an advance of £2000 on his own note. On the 12th, £3000 was placed to credit, and on 4th May £1000, and again £5000 was put to his credit on the security of a bill of sale over two ships. In 1854, Walton, at that time governor of the bank, along with Brown and others, obtained advances in order to enable them to continue business, they having informed the manager that if they were not assisted they would be obliged to stop payment. Most of the advances made in this manner turned out bad debts, and the bank sustained such losses as to be really insolvent. The last balance-sheet laid before the shareholders at a meeting on 1st February 1856, showed a "gross balance for the year ending 31st December 1855, after making provision on account of bad debts, and paying interest (£25,320, 8s. 3d.) on deposits and promissory notes, and balances," of £30,551, 2s. 7d. On the other side credit was taken, under "assets," by loans for short periods, advances on cash credits, bills discounted, etc. for £986,272, 11s. 1d. But this latter sum included the advances made to some of the directors, along with other bad debts, and certain sums lent over unrealizable securities. It was also proved that some of the bank's shares had been bought with the bank's money, "which," said Lord Campbell, who presided, "would not be justifiable under any circumstances."

The directors were not all equally to blame, some having more direct acquaintance than others with the business of the bank. But as to the crime of conspiracy, Lord Campbell said in summing up: "It is not essential that evidence should be given of any formal consultation, in which the parties are supposed to have deliberately resolved to do an illegal act, or to do a legal act by illegal means; but if, as reasonable men, you see there was a common design, and they were acting in concert to do what is wrong, that is evidence from which a jury may suppose that a conspiracy was actually formed."

The defendants were found guilty, and sentenced to various terms of imprisonment. "I acquit you," said the presiding judge when sentencing the convicts, "of having originated this bank with the fraudulent intent to cheat the public; but it is now demonstrated that for years you have carried on a system of deliberate fraud, and fabricated documents, for the purpose of deceiving the public, for your direct, or indirect, benefit. It would be a disgrace to the law of any country if this were not a crime to be punished. It is not a mere breach of contract with the shareholders or customers of the bank; but it is a criminal conspiracy to do what inevitably leads to great public mischief in the ruin of families, and reducing the widow and orphan from affluence to destitution."

The time has not yet come for expressing an opinion as to who is to blame for the events which have led to the failure of the City of Glasgow Bank. That a gross fraud has been perpetrated there can be no doubt, but those who were responsible for the management have been arrested, and till it has been discovered which of them are the guilty parties, it would be an act of injustice to condemn any one. The failure is a national calamity. A generation will have passed away before its results have ceased to be felt. No words can depict the anguish which is felt by the sufferers. Broken fortunes, ruined homes, rent hearts, and shattered hopes are the portions of the unfortunate partners in a great commercial concern, which the reckless cupidity and criminal misconduct of, most certainly, some members of the directory have brought to destruction. In many respects its history resembles that of the Royal British Bank. The deception existed, apparently, in 1873. In June of that year fictitious entries to the amount of £973,000 were made. A dividend of ten per cent. was declared. Just as in the case of the Royal British Bank, new shares were issued, and the prospect of a high rate of interest induced many shareholders, who had confidence in the integrity of the officials, to take them up. Four debtors owe the bank, among them, £5,700,000, advanced on security which is now estimated at £1,500,000, leaving a deficit of £4,200,000. This enormous unsecured sum has been put down as a good debt, a good realizable asset, in the balance-sheet, on the strength of which shareholders,

the public, and other banks, were induced to trust the Glasgow Bank. The imprudent speculations in Welsh mines, which to a large extent led to the insolvency of the Royal British Bank, sink into perfect insignificance compared with the gigantic folly, to use no harsher term, which characterizes the investments made by the directors of the City of Glasgow Bank. But four short months ago the shareholders believed that their capital of £1,000,000 and the "rest" of £450,000 were safe and sound, while the directors declared a dividend of twelve per cent. In four short months capital and rest alike are gone, and in their place stands a debt of £5,000,000, which the shareholders are called upon to pay.

We say nothing of the details of the fraud, such as the systematic falsification of returns to the Treasury, the cooked accounts, the lying balance-sheets, the deception practised towards other banks as to the rate of interest given to depositors, the purchase, as is alleged, of shares with the bank's money in order to keep up the price, which, although legal, has a sinister aspect when the actual state of the bank is taken into consideration. These matters will be investigated at the approaching trial, to which the country looks forward with painful anxiety. The point at issue will be, not whether a series of frauds has been committed, but *by whom*. Many questions and difficulties may arise, but, while aware that no adequate penalty can be inflicted on the authors of this great misfortune, we hope, in the interests of that public morality which they have defied, to see them exposed and brought to punishment.

PARTNERSHIP.

It is creditable to the care and skill of Scottish conveyancers, and to the shrewdness of Scottish men of business, that we have had in the Scottish Courts so few cases relating to the constitution of partnership. Scottish traders generally take good care to know to whom and on what security they are making trade advances; and hence the doctrine of "holding out" has not received much illustration in this country. We have not, of course, any more than our English brethren, been able to manufacture an exhaustive definition of partnership. Mr. Justice Lindley, in his well-known work on this subject, gives no less than fifteen definitions, all by very learned and acute lawyers; and, as Sir George Jessel modestly said in a recent case, "anybody reading the fifteen may get a general notion of what partnership means." He seems himself to prefer, as the most simple and accurate, the definition of the New York Civil Code: "Partnership is the association of two or more persons for the purpose of carrying on business together and dividing its profits between them;" and the only correction he makes on it is to suggest that, as Pothier says, the profits must be *un profit*

honnête (animo lucri, quod honestum sit ac licitum, in commune faciendi), the business must not be unlawful, *e.g.* baby-farming. You may, of course, have a dormant partner who puts nothing in; and, therefore, the words about contribution of property, skill, labour, goodwill, etc., which appear in many definitions, are not precisely accurate in the abstract, although they apply truly to the great majority of partnerships. The most difficult and the most frequent question which has recently arisen in the cases on this subject is whether an arrangement by which an apparent creditor who has made, or continues to make, advances to the business, obtains a security over the business by way of assignation to the effects or stipulated right of control and interference, accompanied perhaps by a right to share in profits, does or does not amount to partnership with consequent liability to less favoured creditors? The last Scottish case is *Stott v. Fender & Crombie*, July 20, 1878, 15 Sc. L. R. 734, following upon *Eaglesham v. Grant*, July 15, 1875, 2 Rettie, 960. These cases, as Lord Shand observed in the latter one, are probably the first in Scotland since the decision of the House of Lords in *Cox v. Hickman* (8 Clark, 268) destroyed the old rule, according to which it was supposed that a right to participate in profits necessarily created liability as partner to creditors; and the law has subsequently been developed in the English cases which we proceed to notice. In *Cox v. Hickman* there was a limited participation in profits, the trustees for creditors carrying on the business, and applying the proceeds and the profits of the business in payment of their debts. It was held that as the creditors had no right beyond the amount of their debts, although for the better recovery of these they had practically taken over the management of the business, they had not incurred liability as partners to creditors contracting subsequent to the date of the trust. In *Pooley v. Driver*, 5 L. R. (Ch. Div.) 458, an arrangement of a peculiar kind was attempted to be set up under sec. 1 of the Act commonly known as Bovill's Act, 28 & 29 Vict. c. 86. That section provides that "the advance of money by way of loan to a person engaged, or about to engage, in any trade or undertaking upon a contract in writing with such person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on such trade or undertaking, shall not of itself constitute the lender a partner with the person or the persons carrying on such trade or undertaking, or render him responsible as such." In *Pooley v. Driver* two persons, who had agreed on a copartnership for fourteen years, raised £10,000 of additional capital in sums of £500, contributed by various persons. These sums were to remain in the business for fourteen years, and the lenders were to receive a share of the net profits in each corresponding to the proportion between the sum contributed and the total capital of the concern. An account was to be submitted each year to these contributors,

and at the close of the copartnership the account of profits over the whole period was to be adjusted, and over payments made to the contributors were to be deducted from the sums repayable. The partners undertook to the contributors to carry on the business during the period. It is not surprising that Sir George Jessel held these contributors liable as partners. His judgment is one of the most vigorous discussions of the idea or notion of partnership which the English Bench has produced. This was obviously not an ordinary loan. It was a mode of raising capital, according to which the creditors or lenders received many of the rights which belong at common law to a dormant partner. True, a dormant partner is liable, because he has agreed to be liable, and not because he has stipulated for, or asserted any of the rights of, a partner against his fellows. But the lenders in *Pooley v. Driver*, although by an ineffectual reference to Bovill's Act in an unsigned minute of agreement they had plainly shown their intention, or wish, not to make themselves liable to the public, were just as plainly selecting a speculative investment without the statutory protection against unlimited liability, but with securities not available to the ordinary lender. The case was decided apart from the terms of the Act of Parliament, but it is unlikely that a properly-signed written contract would have made any difference in the result. The "advance of money" was not the only circumstance from which liability was inferred; and it may be doubted whether an advance for fourteen years on the conditions above explained would be treated by any Court as an "advance by way of loan." In *Ex parte Tennant*, 6 L. R. (Ch. Div.) 303, a father anxious to set up his son in business as a stockbroker lent him a sum of £5000 in the stocks, became guarantee to the extent of £5000 more, agreed to accept a share of the profits made on the business, reserved right to call for accounts, and made various stipulations as to the management of the business, and the amount of the son's drawings therefrom. He was also entitled to withdraw his advances on a certain notice being given. The son, who carried on other concerns in which the father was not interested, becoming bankrupt, it was the interest of the father to represent himself as a partner, in order that he might himself realize the partnership estate and divide it among the creditors. The Lords Justices, however, thought that he had neither the rights nor the liabilities of a partner, but that he had merely come forward to assist his son, for whose behoof the business was truly carried on. Again, in *Ex parte Delhasse*, 7 L. R. (Ch. Div.) 511, Delhasse advanced almost the entire capital of the business for a period of three years, which was also the duration of the copartnership subject to renewal. He received twenty-five per cent. of the net profits on the whole business. He was entitled to annual statements of account, and in the event of a stoppage he was to act as liquidator of the concern. Here the Lords Justices thought that the contract was in no way

protected by Bovill's Act, but in fact embodied the very arrangement which the Act intended should be followed by liability. The ostensible partners were not trying to work a debt off a business of their own; they were acting largely no doubt for their own behoof, but also as the agents of a powerful principal who had enabled them to start, and who, although dormant as regards the public, retained effective control over the business, and a direct interest in its success. There was indeed a power to pay off *Delhasse* (a power not likely to be exercised), but this, as L. J. Thesiger observed, although not aiding the proof of partnership, was certainly not inconsistent with it.

We now come to the Scottish cases. In *Eaglesham v. Grant*, Grant, an accountant, had become security for the compositions payable by Munro, a draper, to his creditors. Munro in return assigned his whole business and estate, and lease of business premises, to Grant, with power to realize. Munro bound himself to give his whole time to the business, but no goods were to be added to stock without authority from Grant, who undertook to make the necessary payments of composition, and for the business supply and expenses and aliment of Munro. All receipts were paid into a separate account kept in name of Grant. After the last instalment of composition had been paid, Grant was to convey back the balance of the estate to Munro, and in ascertaining this balance was to take credit for a commission of £7, 10s. *per cent.* upon all monies received or recovered by him in carrying on the business and realizing the estate. While this was the agreement of parties, there was no actual charge of possession, the business being conducted in the name of Munro, who granted bills for goods supplied, and receipts for customers' accounts. Grant's cheques on the separate account were made payable to bearer and handed to Munro, so that the latter actually made the payment or remittance. Munro's business went from bad to worse, and he was ultimately sequestered, Grant being then in considerable advance to the concern beyond the amount of the composition instalments. In these circumstances Lord Shand, in an interesting judgment which was unanimously adhered to by the Second Division, gave effect to the principle laid down by Mr. Justice Lindley, that "no person who does not hold himself out as a partner is liable to third persons for the acts of persons whose profits he shares, unless he and they are really partners *inter se*." It was argued for the pursuer not merely that Grant was a partner, but that he was sole partner or principal, and Munro only his agent or servant for the conduct of the business. "But," as Lord Shand observed, "the substance and effect of the agreement was, that the defender (Grant) undertook to guarantee the payment of debts due by Munro, which might involve an advance on his part, on condition that Munro should conduct his business under stringent supervision, and should pay the defender a commission

on the gross amount to be received in connection with carrying on the business and realization of the estate until the defender should be relieved of his guarantee."

These principles have again been followed in *Stott v. Fender & Crombie*. To this case, there being no written agreement, Bovill's Act was held not to apply. The defenders, a farmer and a joiner, had become co-obligants in a bond of cash credit to a bank in favour of John Turnbull, a tanner and skinner. On Turnbull's sequestration they were compelled to pay a considerable sum to the bank. On Turnbull being discharged on composition, the defenders opened another cash credit (this time in the names of themselves and another friend of Turnbull's), from which Turnbull was supplied with funds to continue his business, the defender Crombie being alone entitled to draw on the account, and all monies received in the business being immediately paid into the credit of the cash credit. Turnbull received twenty-five shillings a week as aliment, and the books were kept by an accountant on the defender's employment, and in them the amount of the cash credit was entered as a company asset, the business being carried on under the name of Turnbull & Company. So much was proved by documents. The parties themselves explained that they had no idea of becoming partners. All they intended was to enable Turnbull to start afresh, and to provide a security for the repayment of the advance necessary for that purpose, and of the advance prior to the sequestration, which, though as a legal debt, extinguished by the discharge, it was still Turnbull's duty to repay. On these facts the Sheriff of Roxburgh held that the defenders were liable as partners, or rather as principals, but his judgment seems to have been based on the documentary evidence alone. The learned Sheriff seems to have thought that in a proof of partnership the alleged partner might not explain that he had merely lent the money. The Second Division of the Court took a very different view of the case. It was observed by L. J.-C. Moncreiff: "I am at a loss to find any element of partnership in this arrangement. That the gross receipts of the business were to be charged with the amount of this old debt, and substantially impledged for it, is a security transaction and nothing else. The whole business would be free the moment the debt was paid, and it was not contended that if the business had been prosperous the alleged partners could have taken any benefit beyond payment of their debt." It must be satisfactory to the mercantile community that these interesting questions of partnership liability are now discussed and decided, not on legal technicalities, or with a view to satisfy some imperious definition, for which nobody in particular is responsible, but on grounds of common sense and fair dealing, and so as to give effect to the honest intention of parties where they have not attempted to do something which the law forbids.

STATUTES AFFECTING SCOTLAND, 1878.

WE have already briefly sketched the provisions of the most bulky and perhaps the most important Scottish Act of the past session, viz. that relating to roads and bridges. We now proceed to deal in a similar way with the other Acts affecting Scotland. The *House Occupiers Disqualification Removal (Scotland) Act*, 1878 (c. 5), is passed with the view of settling questions which have arisen relating to the third section of the Reform Act of 1868. Subletting his house during the qualifying period of twelve months is not to disqualify the voter, provided that the periods for which it is let do not, in the whole, exceed four months, and that it is let furnished.

The *Public Parks (Scotland) Act*, 1878 (c. 8), extends the powers given by the Public Health Act of 1875, and the Artizans and Labourers Dwelling Improvement (Scotland) Act of the same year, and may therefore be looked upon as a further contribution to that sanitary legislation which was to signalize the reign of the present Government. For the purpose of securing ground for a public park, the local authority have the powers of the Lands Clauses Consolidation Acts conferred upon them, subject, however, to the control of the Secretary of State, to whom they are to present a petition setting forth the lands which they wish to take, who, if upon inquiry satisfied, may pronounce a provisional order, empowering the local authority to acquire the lands. The acquisition by the local authority extinguishes all such rights as servitudes over the ground acquired, subject of course to claims of compensation. We fear it may be some time ere this Act is taken advantage of. The love of healthy recreation is still to a great extent dormant in Scotland. A park presented by the generosity of some citizen is all very well, but it is another matter when ratepayers are called upon to put their hands in their pockets. The *Bills of Exchange Act*, 1878 (c. 13), has already been noticed (see July issue).

The *Factory and Workshop Act* (c. 16) applies to Scotland. It is of great length, containing 107 sections, and repealing under the sixth schedule attached, in whole or in part, no less than nineteen previous statutes. It may be viewed as a consolidation of the law relating to employment in all the various factories. But it is impossible at present to give any idea of its details.

The *Prison Authorities Act*, 1874, *Amendment Act*, 1878 (c. 40), removes a doubt as to the application of the Act of 1874 to Scotland, and provides that the expression "prison authority" in that Act shall be deemed to include county prison boards in Scotland, as such boards existed prior to the Act of last year. The *Parliamentary Election Returning Officers Expenses (Scotland) Act* (c. 41) remedies a serious evil, to which returning officers in Scotland have

been exposed. Any bankrupt candidate might, by offering himself for election and going to the poll, render them liable in considerable expense. But now the returning officer may demand security, which must be given upon the day of the nomination, or otherwise the candidate failing to offer it shall be deemed to be withdrawn. The maximum amount of security varies according to the number of electors; from £150 where the electors do not exceed 1000 in the county or district of burghs, to £1000 where they do not exceed 40,000. In the case of a single burgh the scale is somewhat less.

The Act does not apply to university elections.

The important Act to encourage regular marriages in Scotland, entitled the *Marriage Notice (Scotland) Act*, has already been noticed in our September issue.

The *Endowed Institution (Scotland) Act*, 1878 (c. 48), is intended to facilitate changes in the government of such institutions, and provides machinery for bringing them about. "Endowed institutions" are defined to mean "school, hospital, or other institutions wholly or partly maintained by means of any endowment, and includes a mortification or bequest for educational or charitable uses, or for uses partly educational and partly charitable, or for the establishment or maintenance of a public library." The governors of such an institution may apply to the Secretary of State for a provisional order for the purpose of improving the government and administration of what has been intrusted to them. The Secretary of State is to remit such applications to special commissioners, not exceeding seven, who are to report upon the expediency of the proposed changes. If a provisional order is then granted, it must be laid for approval before Parliament. Vested interests are duly protected in the event of changes being introduced.

Passing over the Roads and Bridges Act, we come next to the *Locomotives Amendment (Scotland) Act*, 1878 (c. 58). It repeals section 3 of the 1861 Act and section 5 of that of 1865, which regulate the weight of locomotives and the construction of their wheels. We fear the danger to passing vehicles caused by such locomotives will not be diminished by section 4 of the new Act, which renders it no longer necessary for one of the attendants to precede at a distance of sixty yards, carrying a signal of the approaching machine. He is now simply to accompany the locomotive on foot—before or behind it, as he pleases. The road authority has a power to make bylaws for regulation of such locomotives, and may even prohibit their use altogether in particular roads; but such bylaws must be confirmed by the Secretary of State.

The next statute to be noticed is the *Contagious Diseases (Animals) Act*, 1878 (c. 74). It is divided into parts, viz. 1, General; 2, England; 3, Scotland; 4, Ireland. Part 2, however, applies to both Scotland and Ireland, except where its provisions

are inconsistent with those intended specially for these countries. A comparison of part 3 with the corresponding part 10 in the Act of 1869, shows but a slight variation in the special provisions relating to Scotland. We observe that where prosecutions under the Act are conducted in the Sheriff Court, the penalties recovered fall to the Exchequer; while if the Justice of the Peace Court is selected, they fall to the county, in aid of the County General Assessment. We imagine very few cases will be disposed of in the former tribunal. Clearly all fines should go to lessen the rates which the Act imposes.

Perhaps the Act of most general interest to the country is the last which we are called upon to notice, viz. the *Education (Scotland) Act*, 1878, which is in future to be construed as one with the principal Act of 1872. The clauses from 5 to 14 inclusive relate to the employment of young children. No one may employ children between the ages of ten and fourteen without a certificate of their education, in terms of section 73 of the former Act, except in the case where the provisions of an Act of Parliament regulating the education of children employed in labour, or of any minute of the Scotch Education Department fixing the standard of education to be required for the partial exemption of children from the obligation to attend school, apply. There is a general prohibition of the casual employment of children under ten years outside their homes. But these prohibitions do not apply where there is no school within three miles of the residence of the child, or when the employment is during school holidays, or while the school is shut. The School Board also may exempt the employment of children above the age of eight from the prohibition of this Act, for the "necessary operation" of husbandry or fishing. Every one taking children into his employment in contravention of this Act is liable in a penalty not exceeding forty shillings. A parent may incur this liability by employing or permitting his child to be employed in any labour for the purposes of gain. The School Board officer has power under warrant of the Sheriff to search places in which it is thought children are being improperly employed. An employer may be exempt if he can show that he has been deceived by the parent of the child as to its age. Under section 15 members of School Boards are enabled to resign on giving one month's previous notice to the Board, and if a member absents himself for six months from the Board meetings without satisfactory excuse his office becomes vacant. Where any Board falls below the number necessary for a quorum, the Scotch Education Department may either nominate persons to fill the vacancies or direct a new election. Sections 18-20 relate to higher class schools, their means of support and mode of examination. Section 21 disqualifies from acting as members of the School Board those holding offices of profit under it. Section 22 increases the facilities for the education of the very poor. Under the former

Act the Parochial Board was the sole judge of the inability of the parents to pay their children's school fees, but now the School Board may apply to the Sheriff to compel the Parochial Board to pay them if after inquiry he should see fit to do so. Under section 23 all prosecution for penalties may take place before any two Justices as well as before the Sheriff, and it is not competent to award expenses against any person employed by a School Board to prosecute. Section 24 removes all doubts as to the right of schoolmasters to enjoy the franchise. Section 31 enables School Boards to exercise the provisions of the Lands Clauses Consolidation Act for the compulsory purchase of sites, with the approval of the Education Department confirmed by Parliament.

COMMUNIO BONORUM IN SWEDEN.

THE author of the interesting work mentioned below,¹ Dr. Olivecrona, is a judge of the Högsta Domstol, or Supreme Court of Appeal of Sweden, and has devoted much time and learning to the elucidation of the history of the ancient custom, which is known as the *communio bonorum*, and has, at one time or another, been incorporated in the laws of most of the European nations of German or Scandinavian descent. Dr. Olivecrona's work is divided into two portions. In the first he treats very exhaustively the history of the rise of the custom among the Scandinavian tribes, and the various modifications which it underwent under the influences of advancing civilization and foreign ideas. The sources from which he has drawn his information are very numerous, and consist principally of the codes, some of very early date, which were in force among the northern tribes. He has illustrated his work by sketches of the systems prevailing in other countries, from which it is not difficult to draw the inference that the *communio bonorum* was a custom which grew naturally out of the home-life of the northern peoples, and that its abandonment has in many cases been due to the fondness of lawyers for the elaborated system of the Roman Law rather than to any real change in the customs of the peoples among whom it once prevailed. In Norway and Sweden neither the Civil nor the Canon Law seem ever to have had much authority attributed to them, and the laws prevailing there are more than in many other countries the expression of the ancient customs, modified of course by the changes in manners and in the distribution of wealth, which separate modern society from the simpler life of the past. The origin of the custom may be traced to the time when the tribe and the village were losing their old position and their old hold over the affections of the people. The villages grew into towns, and the burghers began to feel the

¹ Om a Makars Giftorätt i Bo Dr. S. R. D. K. Olivecrona, Justitieråd. 4th edition. Upsala: W. Schultz.

interest in the prosperity of their house which their fathers had felt in the wellbeing of the village; while in the country the growing love for the homestead supplanted the attachment to the tribe. The family rose into importance, as the essential element of social life. The position of the wife was thereby improved. She was more and more regarded as on an equality with her husband, and was thus felt to have an equal interest in the prosperity of the family, and this naturally led to the property of the spouses being thrown into a common mass, over which each was supposed to watch with equal vigilance, and in which each was held to have important rights. The development of the *communio bonorum* seems to have been most thorough in the small trading towns, where the interests of husband and wife from an early period were held to be identical, and where the exertions of the wife were regarded as contributing more to the prosperity of the family than in the country, where the husband, through his ownership of the land, contributed the greatest share to the income of the household. Whatever the origin of the custom, it was rapidly adopted, and, though with numerous modifications, became the rule among all the northern tribes.

In the second part of his work Dr. Olivecrona treats of the existing law of Sweden affecting the property of married persons; and it is not uninteresting to remark the modifications which have of late years been forced upon the older system, and the tendency of which, like that of the alterations introduced by statute in our own country, is to secure to the wife a more independent position, and to render her less liable to suffer through the misconduct or misfortune of her husband.

The Swedish law was codified in 1734, and seems to have been found in practice satisfactory and useful, though without much pretension to precision of expression, or nice adjustment of legal theories. Under this code the *communio bonorum* was regarded as the rule which should regulate the rights of married persons in the property which each possessed before marriage, or afterwards acquired, but it was left competent to vary the legal rights of parties by an antenuptial contract. In practice, however, Dr. Olivecrona says that antenuptial contracts have been comparatively rare, and that the rule of law has thus been shown to be in accordance with the wishes and feelings of the people. Though modifications and exceptions have been introduced by subsequent legislation, the law of 1734 is still in force. Under that code moveables, whether acquired before or after marriage, fall into the common stock, the sole power of disposal over which is vested in the husband, who, however, may delegate to his wife a power of disposal. There are some exceptions. In the first place, a testator may bequeath moveables under the condition that they shall not form part of the common stock, and money given by parents conditionally, e.g. an alimentary provision for a child; and in the

second place, moveables, which are the pertinents of subjects, which do not fall under the *communio bonorum*, e.g. the agricultural implements and stocking of an inherited farm, are themselves excluded. In 1874 a further exception was made by Royal Ordinance (equivalent to an Act of Parliament) to the effect that whatever a wife gains by her own work she can claim to retain and dispose of, but if she allows her earnings to be mingled with the common stock she loses her right. On the other hand, conquest land falls under the *communio* as well as all heritable property in towns, whether inherited or purchased, unless the rule of law is excluded by special provision.

The law of 1734 assigned different shares to the spouses in the common stock according to the rank of the parties and the nature of the subjects. In the case of moveable property belonging to nobles and peasants, the share of the husband was two-thirds, and that of the wife one-third, and heritable property in the country falling under the communion was divided in the same way; but heritage situated in towns was divided equally between husband and wife without reference to their rank. The property, again, of priests, burghers, and all persons not of the noble class residing in towns was divided equally between husband and wife. If a peasant sold his farm and came to reside in a town, his wife's share became one-half instead of a third; and, on the other hand, if a burgher were ennobled, his share of the goods in communion was held to be two-thirds, as the rights of parties were always regulated according to the rank and residence of parties at the dissolution of the *communio bonorum*. These rules were altered in 1845, since when each spouse has an equal share in the common stock. The division of the common stock between the husband and wife, or the representatives of the predecessor, takes place in the event of the dissolution of the marriage by death or divorce, in which latter case the offending spouse forfeits one-half of his or her right to the other; and in the event of either spouse murdering the other, the murderer forfeits to the representatives of the murdered his or her whole right in the goods in communion. A peculiar provision of the law of Sweden, dating, however, only from 1862, gives the wife right to demand that a separation of the common stock shall be made in certain circumstances, although no separation of the spouses takes place. This separation is decreed by a court of law on the application of the wife, who must prove that the common fund is overburdened with debt, or that her husband, through extravagance or other cause, is misusing his right of administration, or that he has maliciously deserted her for a period of at least six months, or that he has been placed under curatory. On these facts being proved, a separation of the common stock is decreed, and thenceforth, whatever the spouses acquire by inheritance or by their own exertions, becomes their private property, and the property of the wife passes under her own control, or under that of a curator named

at her request by the Court. As has already been mentioned, the Swedish law gives to the husband the right of administration of the whole property of the spouses, whether in communion or not; but in the event of the husband's absence, desertion, or incapacity, the wife, as equally interested with him in the prosperity of the family, was allowed to assume the management, and even to dispose of the common property, but only with the advice and approval of her next friend. The reasons for her exclusion from the management, viz. the desire to secure uniformity of administration by the spouse best able to direct the common affairs, and the wish to prevent the quarrels which are apt to result from a divided management, do not exist in the cases supposed, and the wife naturally assumes the administration of affairs. A review of the peculiarities of the Swedish system, as explained by Dr. Olivecrona, shows that the *communio bonorum* exists there in full vigour, notwithstanding the exceptional provisions in favour of the wife which have been introduced by recent legislation, while the permission to the wife to claim a separation of the common stock is conclusive, as showing that the rights of the wife are not eventual rights, of the nature of the *jus relictæ* in Scottish law, but are as complete as those of the husband. The spouses have equal rights of property in the common stock, and the husband cannot by altering the nature of the investments exclude from the division the proceeds of any subject which has once fallen under the communion; while his extensive powers of administration and disposal are the powers of a curator, or managing partner, rather than those of an absolute proprietor. A comparison of the Swedish and Scottish systems, especially since the abolition of right of the wife's next of kin by the Moveable Succession Act, gives some support to the position for which Mr. Fraser has contended, that the Scottish law did not and does not recognise a *communio bonorum*; but that while the husband acquires the moveable property of the wife, she only has an eventual right, and that during the subsistence of the marriage she cannot be said to have any right of property such as we have seen is retained by the Swedish wife. The theories of Scottish lawyers in regard to the *communio bonorum* at any rate have not been clear and consistent, and recent legislation and decisions have deprived the doctrine of almost all practical importance.

Dr. Olivecrona is an enthusiastic admirer of the *communio bonorum*, which he regards as the right basis upon which the pecuniary relations of husband and wife should be regulated, and looks with disfavour on the moderate exceptions which recent legislation has introduced; while foreign systems, which either leave to each spouse the property which they possessed before marriage, or give the whole estate of the wife to the husband, are equally disapproved of by him. The former, he thinks, leads to frequency of divorce, and instances the experience of some American States. The latter, he holds, deprives the wife of the

interest in the prosperity of the family and the increase of its wealth which a right to the goods in communion gives her. It is almost with pleasure that he points out how the abolition of the curatory of their father or relatives, to which all unmarried women were formerly subjected, will render marriage contracts rare, as he doubts whether brides will venture to stipulate for any provisions which limit the powers of their future husbands; and in his concluding chapter, which gives an interesting account of the objects at which marriage law reformers are aiming in Sweden, he expresses strongly his view that the alteration of the present system in favour of one wherein the property of each would remain separate and distinct, and wherein no right of administration would be left to the husband, would produce very serious social changes and dangers.

PROOF BEFORE ANSWER.

IN the case of *Robertson v. Murphy* (Dec. 7, 1867, 6 Macph. 114), the Lord President Inglis says that the meaning of these words "before answer" is "perfectly settled in the practice of the last two hundred years," while Lord Curriehill observed, "If there is anything established in the law of Scotland, beyond all doubt it is the meaning of the words 'before answer,'" and yet it is obvious from the report that there was a difference of opinion upon the Bench as to what this precise meaning is. In *Murphy's* case a remit had been made before answer by the Lord Ordinary (Barcaple) to an accountant to inquire into and report upon certain matters, "with power to him to take probation thereanent." Parties raised the question before the accountant, whether upon a certain point it was competent to lead parole evidence. The matter was referred by the accountant to the Lord Ordinary, who held that under the remit he was entitled to receive parole proof offered by either party. In the Inner House the majority of the Judges were clearly of opinion that the way was not opened for the admission of incompetent evidence by allowing a proof "before answer." As the Lord President said, "these words mean that when proof is ordered before answer, every question raised on the record of law or relevancy is reserved entire, and that to construe these words as meaning that the proof is to be taken before answer as to whether it be competent at all or not, is a construction I cannot adopt." Lord Deas, however, was of the opinion that they sometimes impute also a reservation of questions as to the competency of the mode of proof. He did not think that "answers were to be taken down which were not evidence at all—hearsay evidence, for example, derived from parties alive"—but that the Lord Ordinary wished "to reserve consideration of the question how far some of the matters which might be spoken to could be competently proved by

parole or by written evidence only." The discussion before the accountant had arisen upon the pursuer seeking parole proof in support of an averment that certain advances made by him to his son were not gifts but loans. By the decision of the Lord Ordinary the accountant was to take the evidence offered, the question of its relevancy being reserved until it had been taken. The view thus taken by the minority, composed of such eminent lawyers, is deserving of all respect, and there certainly appears to be authority for it; for it is somewhat difficult at first sight to reconcile the unhesitating opinions of the Lord President and Lord Curriehill as to the meaning of the words "before answer," with the course taken by the Court in the previous case of *M'Rostie v. Halley*, Nov. 16, 1849, 12 D. 124 and 816. In that case a bill was objected to as having the date written on an erasure, and the pursuer lodged a minute offering to prove the authenticity of the date of the bill, and that the erasure had not been made after the date of acceptance. The Court allowed him before answer a proof of his averments in his minute. A proof was taken and reported by the Lord Ordinary, who was of opinion that the pursuer had made out his averments, but that the bill could not form a warrant for summary diligence. Upon appeal the Lord President was clearly of opinion that the Court was not foreclosed from considering its relevancy, seeing that this proof was before answer. And Lord Mackenzie said, "I concur. There is no doubt that as the proof was allowed before answer its relevancy is still an open question." These opinions seem to conflict with that delivered by the presiding Judge in *Robertson v. Murphy*. But perhaps M'Rostie's case may really be viewed as an illustration of the real meaning of these words. For the question raised in this case does not appear to have been whether or not it is competent to prove by parole the circumstances under which an erasure has been made upon a bill, but whether it is possible, whatever these circumstances may have been, to exercise summary diligence where the bill contains an erasure. The Court first ascertained the circumstances under which the erasure was made, and then considered the legal question.

According to Stair, the proof before answer was an innovation upon our older practice. Writing of the English custom of joining "the point of fact and right," and judging "what point of right there ariseth from the fact proved by either party," he says: "Our ancient custom did not allow this way in any case, being tenacious in this axiom, *Frustra probatur quod probatum non relevat*; and with very good reason, that people should not be put to the trouble and expense to adduce witnesses before it was determined what points would be effectual if they were testified, besides that oaths should not be taken in vain." But he adds, "By more recent custom the Lords have of a long time *ex nobili officio* preferred neither party to the proving of contrary allegiances, but before answer for

determining the relevancy they have allowed either party to adduce so many witnesses, to be examined upon such points as the Lords found fit to be cleared for instructing the cause." This expression, "points found fit to be cleared," really explains what is at all events the main object of a proof before answer. If cases were always presented in which the question of law stood out quite separate from the facts, and unaffected by them, there would of course be no call for such a reservation in granting any proof, but, as all practitioners know, this seldom happens, and often the facts so bear upon the law that it is difficult, if not impossible, to dispose of the latter without a knowledge of the former. Where proof of these facts is allowed, the question of their relevancy upon the points of law raised in the case is rightly not disposed of until the facts are properly before the Court.

The proof before answer clearly does not open the way to any violation of the well-known rules of evidence. Such a rule, for example, as that pointed out by Lord Deas, the exclusion of hearsay. But the question remains, Does it not enable evidence to be taken as to the competency of which there is a doubt on the mind of the Judge ordering the proof, or must the competency be decided first? Lord Deas thinks the course of allowing the competency or incompetency of certain evidence to remain undecided until the whole is before the Court has frequently been taken with advantage, and he "should be sorry to see the practice altogether discontinued, although great discretion is to be exercised as to the cases in which it ought to be allowed." His Lordship quotes, as "recent instances," the cases of *Bryce v. Young's Executors*, January 20, 1866, 4 Macph. 312; *Muir v. Ross's Executors*, June 15, 1866, 4 Macph. 821; *Morris v. Riddick*, July 16, 1867, 5 Macph. 1036; and also the earlier case of the *Lord Advocate v. McNeil*, February 6, 1864, 2 Macph. 626. The three first-mentioned cases have a family resemblance in their circumstances, all bearing upon the question of donation. In Bryce's case a cheque had been given by a person on deathbed to one to whom he owed money, and a dispute arose as to the footing upon which this cheque had been given. A proof was opposed on the ground that it was an attempt to prove donation *mortis causa* by parole evidence, but the Court allowed a proof before answer. The rubric bears it to be held "that parole evidence was admissible to show under what circumstances the cheque was given;" and Lord Curriehill is careful to point out that they were not trying the question of the competency of parole evidence in cases of donations. "This action," he says, "involves questions of nicety. But I do not think that among these is the question whether a donative case be proved by parole evidence. The very basis of the rule is taken away in this case, because we have here a written document. . . . The basis of the case, in short, is writing; and the question is, *quo animo*, was that writing delivered?" And Lord Ardmillan described it as

a case in which all the "questions cluster round the written document." Still, the plea of the incompetency of a proof in the circumstances was taken, and by the procedure adopted by the Court necessarily reserved. In Muir's case the holder of a deposit receipt alleged that it had been given to her by a party deceased, and offered to prove by witnesses that the deceased had expressed his intention of making this gift. The Lord Ordinary held such evidence incompetent; but the Court ordered a proof before answer, and according to the rubric it was found "that parole evidence was admissible to prove that the receipt had been delivered by the deceased to the holder *animo remanendi*." In these cases it may be said that the proof merely cleared up certain circumstances, in order that the law, about which there was no doubt, might be applied. But in the case of Morris the main question discussed, after a proof before answer, was whether or not donation *mortis causa* could be proved by parole. Lord President Inglis said, in giving judgment: "It has been represented that this was in practical effect a legacy, though it was more correctly described as formally a *mortis causa* donation; and it was argued that, in either way of looking at it, it must be constituted by writing, and that therefore proof *prout de jure* was incompetent. That raises an important question, requiring deliberate consideration." And we find Lord Deas speaking thus: "Whether the proof led here be competent or not, I can have no doubt of the matter of fact." Surely, therefore, the Court here held the competency of the proof to be still open for consideration. It is right, however, to mention that the proof had been allowed by the Lord Ordinary and not the Inner House.

In Lord Ardmillan's opinion given in Murphy's case he observes: "There have been cases where a proof has been allowed 'before answer,' reserving all questions as to the admission or exclusion of parole proof on particular parts of the case. But in such cases the reservation as to competency of parole proof must either be so stated, or it must clearly appear that that was the scope of the reservation, and the meaning of the interlocutor of the Court." The different views which exist as to the precise meaning of these words are still further illustrated by the more recent case of *Macvean v. Maclean*, March 8, 1873, 11 Macph. 506. The Court allowed a proof before answer, in order to establish the date of a particular document. Lord Neaves suggested that the words "before answer," which, according to his understanding, meant before answer as to the relevancy, should be omitted. "I cannot see any justification for the practice of allowing a proof 'before answer as to the competency.' If it is incompetent, the competency should be decided now. I am of opinion that the proof allowed is competent, and should be allowed, but I would rather that these words were left out of the interlocutor, as the facts alleged seem clearly to be relevant." This view we find distinctly controverted by the Lord

Justice-Clerk Moncreiff, who says, "It does not follow that, when a proof before answer is allowed, in such a case we decide anything on the competency of the evidence which may be adduced, of which we cannot judge at this stage. I therefore differ from Lord Neaves as to these words 'before answer.'" And he interpreted the words to mean "not before answer only as to the relevancy, but also before answer as to the competency;" and did not recollect a case where parole proof regarding a privileged document had been allowed without inserting them in the interlocutor allowing proof.

After this, what are we to say as to Lord Curriehill's remark, or to that of Lord President Inglis, when he says that the meaning of these words is "perfectly settled"? We think the decisions leave us in considerable obscurity. We may have a faint idea that, after all, the Judges mean the same thing when some talk of relevancy and others of competency; but surely it were desirable to have the import of these words, "before answer," rendered less ambiguous than at present it seems to be.

Reviews.

Decisions in the Court of Session from 1800 to 1878, in Cases connected with the Agriculture of Scotland. Compiled by J. STILL ANDERSON, F.S.A. Scot. W. Blackwood & Sons. 1878.

THIS is a book evidently not so much intended for the use of the profession as for that large class of persons who have an interest in agriculture, and who may find it useful to have a book at hand in which they may see, explained in a popular way, the various decisions which have been given in the Supreme Court on questions relating to land rights in general, and the many points of dispute which are continually arising between landlord and tenant. Mr. Anderson has succeeded in compiling a book which we do not doubt that many proprietors, farmers, and the like will find valuable. It is well arranged, the different decisions being classified under suitable headings, and the references, both to the volume of reports in which they appear and any book, such as Hunter's "Landlord and Tenant," in which they may be specially referred to, being carefully and accurately given. The principal divisions under which most of the decisions fall are as follows: 1. Constitution of Lease of the Farm. 2. Mutual Rights of Landlord and Tenant. 3. Assignations, Succession, etc. 4. Questions with Singular Successors. 5. Violent Profits. 6. Removing. 7. Renunciation. 8. Game. 9. Miscellaneous Cases. These divisions are again divided into sections and subsections, so that the reader can refer at once to the

subject in which he is more immediately interested. A page is devoted to the explanation of the Latin phrases and technical terms which occur, so that the non-professional reader may be at no loss to understand the full meaning of the reports. Between five and six hundred cases altogether are given, and a most admirable index tends greatly to increase the utility of the volume. Though it will probably prove of most advantage to the class of persons whom we have above specified, it may often happen that it will save time and trouble to the professional lawyer, owing to the whole series of decisions being presented in such a compact and accessible form. We may draw attention to the fact that the book has been revised by counsel, the gentleman who undertook this task being the late Mr. J. D. Dickson, whose early death it is our melancholy duty to chronicle on another page. His work has been done most carefully and thoroughly, and his painstaking accuracy is particularly exemplified in the index, which we believe he himself compiled. Altogether we can conscientiously recommend this work to the attention of our readers.

The Law and Legislation of the Past Year. An Address to the Practitioners before the Sheriff Court of Edinburgh.

WITH the fall of the leaves once again we have in a thirty-page pamphlet Mr. Hallard's address to his procurators on the law and legislation of the past year. Perhaps it would be more correct to omit any reference to legislation in the title, for all the new Acts are disposed of in precisely two pages, a review of them being, to use the author's own words, "much simplified by the Eastern Question." In the matter of legal decisions, however, the pamphlet before us has certainly considerable interest, for after a somewhat shadowy introduction, with allusions to Lord Gifford, the Proculians, Tycho Brahe, and a future Minister of Justice, there come a good many pages devoted to the doctrine of *collaborateur*, and the controversy, legal, editorial, and parliamentary, which has recently been waged upon the subject. Mr. Hallard has great objections to a change in the direction of increasing the liability of employers, he says, "The substitution of one who is not the true debtor, but is presumably rich, in room of one who is the true debtor, but is presumably poor, is open to three objections. It is unjust, it is judge-made, it is a step in the direction of communism." Now, in the first place, to say that one is the true debtor and the other is not, is in reality to beg the whole question. We cannot share the dread of communism which is stamped upon the pages of this pamphlet, because we do not see in a legislative effort to relieve distress and fix liability any tendency towards that loosening of the rights of individuals in what is their own, so essential a feature of every communistic dream. The pages of this *Journal* have recently been occupied with a series of articles

on this very question, and it was pointed out that means could be devised, ay, and had been so devised in other countries, whereby an insurance premium would secure the employer against claims from his workmen, and give them a fund on which to fall back for relief. "Sharpening the fangs of the criminal law against the actual offender," and giving to Board of Trade officials "powers of precautionary supervision more searching and more incisive" are excellent suggestions; but the latter does not meet the difficulties arising out of an accident when it has happened, and even under the most perfect system accidents must sometimes occur; again, the punishment of the offender is also most desirable, but it does not feed the starving children of his victims, while frequently the catastrophe embraces its author in the grim list of the dead. We do not think Mr. Hallard has made sufficient allowance for the peculiar exigencies of these great and almost national misfortunes, and that he too hastily would credit those who desire a change in the law with an intention of saddling employers of labour with indefinite liability, whereas the suggestions now being made rather point either to compulsory insurance by the master, and a limit in the sum claimable by the man, or else to the creation of a fund by the imposition of a regular tax for the purpose of enabling the State to pay certain compensation.

The learned Sheriff-Substitute has further some valuable remarks upon the case of *Smith v. Chambers' Trustees*, and the changes of the law as regards the formalities requisite in probative writs. The curious questions in marine insurance raised by *Burrell v. Simpson & Co.* are also referred to, and what Mr. Hallard says, that he has ventured, not without high authority, to call "the iniquitous principle of an employer's liability for his servant's acts," gets the blame of all the perplexity and difficulty in the case. Following upon these examples culled from the reports of the past year, we have short notices of one or two other cases. At the end of the pamphlet some remarks upon last year's "Act for the Protection of the Property of Married Women in Scotland." We entirely concur in the remarks there made, and in the hope there expressed that power will ere long be given to the Sheriff Court to grant separation. Meanwhile, as to the Act already passed, we will follow Mr. Hallard's example, and quote the epigram of the Dean of Faculty, "The Act unsettles everything and settles nothing."

Obituary.

DAVID LAING, LL.D.

ALTHOUGH Mr. Laing was not a member of the legal profession, it is most fitting that a tribute to his memory should be paid by the *Journal of Jurisprudence*. He was one to whose labours not a few

students of legal history and antiquities must have been deeply indebted, and for many years he honoured one of our great legal bodies by undertaking the charge of its valuable library. He has lived a long and laborious life, and achieved in the course of it an amount of work which only steady devotion and great zeal could have rendered possible. He has earned a reputation extending far beyond his own country, and far greater than those around him probably ever imagined, for Mr. Laing was not brought much into public notice, and did not court publicity.

Evidently of a very strong constitution, he was able to pursue his favourite work almost to the very end, escaping in a great measure the infirmities of age. Only a few weeks before he was called to take "sleepe after toyle" we visited him in his own interesting residence, surrounded with so much to remind one of the past times in which the owner to a great extent lived. He was then fighting bravely with disease, and busy at work with his proof-sheets although hardly able to sit at his table, and full of a scheme for commemorating by a monument that great divine and reformer whose fame and merits he has himself done so much to perpetuate.

Even his recreations were characteristic. Summer after summer he was wont, as long as his health permitted, to join a number like-minded with himself in the south, bent upon antiquarian discussions and the exploration of the antiquities of the district visited, speculating upon their history, and possibly finding prætoriums.

To be a genuine antiquary one need not be a visionary, and a great knowledge of the past is quite compatible with living a useful practical life in the present. No one who knew Mr. Laing can doubt that at his great age death cannot surprise us, but we feel his loss not only because he was a link with the past, but because he was a useful practical man needed now, whose place it is almost impossible to fill.

J. D. DICKSON, Esq., Advocate.—We were only able in our last number to notice in the briefest terms the death of the above gentleman; it may be permitted to us now to fulfil the melancholy duty of paying a passing tribute to his memory. Born in a Dumfriesshire manse some eight-and-twenty years ago, he was educated at the High School and University of Edinburgh. He was called to the Bar in 1873, and while there won the esteem of all with whom he came in contact by his unaffectedness of character and amiability of disposition, and was gradually acquiring some share of practice. A careful and conscientious worker, he did whatever business came in his way in a thorough and satisfactory manner; the very last work which he did—the index to Mr. Still Anderson's "Digest of Agricultural Decisions," which is reviewed in our present number—is a good testimony to his accurate and painstaking labour. His loss will be much felt by a large circle of attached friends, for

no one who knew him socially could fail to be attracted towards him. He was a keen sportsman with both rod and gun, and no one enjoyed more a day by the river-side or on the moor; of a strong and manly physique, he excelled in many athletic exercises, and his simple and unassuming manners made his company most acceptable wherever he went. It is but left for us to lament his early death, and to mourn over the bright promise which has been so sadly cut short.

ROBERT GRANT, Esq. of Kinarth, Advocate.—The above gentleman died, on the 15th ult., at Kinarth, near Forres. He was born in 1801, and was called to the Bar in 1823. He was a deputy-lieutenant for the county of Elgin, and married in 1859, Edith, daughter of the Rev. Thomas Eaton, Canon of Chester, by whom he has left a family.

G. L. SINCLAIR, Esq., W.S. (1827), died in Caithness on the 22nd October.

The Month.

Correspondence as to Reports of Scottish Appeals in the House of Lords.—We have been requested to publish the following correspondence:—

Mr. Paterson to the Council of Law Reporting.

GOLDSMITH BUILDING, TEMPLE,
July 8, 1878.

GENTLEMEN,—As Mr. Macqueen, one of your reporters, has for the last fifteen months ceased personally to report the Scotch Appeals, and there is now no likelihood of his ever resuming that arduous employment, I beg to offer my services in supplying you with competent reports of those Appeals for the same remuneration which you have hitherto paid to him. As it is not credible that any possible arrangement with a reporter engaged to supply the representatives of the profession with legal reports can authorize him to delegate work which is so exclusively personal—as the money of the subscribers to the Law Reports is intended for work really performed—and as nothing can recommend a practice, whereby this kind of skill can be systematically delegated by a person who is only nominally employed, and who nevertheless receives the full emoluments, I assume that you have only been waiting during the long period above mentioned, in order to ascertain whether it is a temporary or a permanent cause which has interfered with the discharge of your reporter's personal functions—an uncertainty which must now be at an end.

As I have occasion to know, that it is your unalterable practice to employ as reporters those only of experience and proved capacity, I beg to remind you that I have already had twenty-seven years' experience in exactly the same duties, in the same Court, and have been supplied with exactly the same materials as Mr. Macqueen; and, as I believe my qualifications are sufficiently known to you, I will not trouble you with referring to them. I may, however, add that I have good reason to conclude that my undertaking the preparation of these reports will be satisfactory to the legal profession in Scotland, for whose benefit they are primarily designed.

I beg to reserve the liberty of publishing, in the legal journals or otherwise, a copy of this letter, together with any answer which you may be pleased to make to it.—I am, Gentlemen, your obedient servant,

To the COUNCIL OF LAW REPORTING,
Lincoln's Inn.

JAMES PATERSON.

Mr. J. T. Hopwood to Mr. Paterson.

LINCOLN'S INN,
July 20, 1878.

DEAR SIR,—In reply to your letter of the 8th inst. the Council desire me to inform you that the appointment of Mr. Macqueen was made by the House of Lords, and not by them.—Believe me, yours faithfully,

J. PATERSON, Esq.

J. T. HOPWOOD, *Secretary.*

Mr. Paterson to Mr. Hopwood.

TEMPLE,
July 31, 1878.

DEAR SIR,—Your reply to my letter of the 8th inst. induces me to state, for the sake of greater clearness, that the fact of the Council of Law Reporting having always paid and continuing to pay only one-third of the total allowance to Mr. Macqueen (the rest of his allowance having always been supplied from other sources) does not in the least degree affect the principle on which my letter was based.—Yours faithfully,

J. T. HOPWOOD, Esq.,

JAMES PATERSON.

Secretary, Council of Law Reporting.

Appointment of Depute-Clerk of Court.—We believe that Mr. William Don, lately clerk to the Lord Advocate, has been appointed to the office of Depute-Clerk of Session vacant by the death of the late Mr. Drysdale. We are glad that this post has at last been filled up, although we cannot but regret the unwarrantable delay which has taken place in making the appointment. Mr. Drysdale died so long ago as the 20th of May last, and, as we took occasion to mention some time ago, there was no possible reason why a successor should not have been at once appointed. A most vicious system has lately crept in of waiting, on the occasion of any post becoming vacant, to see whether the official can be done without, at least that is the only reason that occurs to us to account for the invariable delay which takes place in connection with filling up vacancies in the judicial establishment of Scotland. It is a system, as we said before,¹ which the last Liberal Government inaugurated, and which has been too much followed by the present authorities. It is a system too which is only applied to Scotland, a country in which the administration of law costs both the nation and individual suitors less than in any other part of the United Kingdom. It may be attributed, we believe, to a variety of causes: partly to the ignorance which most Scottish members of Parliament show with regard to the law of their country; partly to an unreasonable jealousy which the people of Scotland have against the legal

¹ Page 434.

profession in general and the Parliament House in particular; and partly, and in a great measure, to the *fainéantise* of the leading branches of the profession itself—the Bar and the Society of Writers to the Signet. If those bodies exerted themselves a little more, and made it clear to Government that there was a strong feeling as to the way in which the country was treated with regard to its legal appointments, matters would, we doubt not, soon be brought into a much more satisfactory state. We are by no means advocating the filling up of useless offices: whenever an office is found to be useless by all means let it be abolished; but let it be abolished legally, by Act of Parliament if necessary, and after due inquiry made. But it is preposterous that important and necessary offices should be vacant illegally for months or years, on the chance that the work belonging to it will somehow or other be hustled through by some other already fully employed official.

Sale of Scottish Prisons.—The following prisons in Scotland, which have been closed by the Government since the new Prisons Act came into force, were exposed for sale in Dowell's Rooms, George Street, last month, at the instance of Donald Beith, W.S., solicitor for her Majesty's Board of Works and Public Buildings:—Kirkintilloch, upset, £120, sold to Mr Reid, Kirkintilloch, for £140; Pollockshaws, sold to Mr. J. Caldwell at the upset price of £360; Hawick, upset price, £120, sold to the Magistrates of Hawick for £350. Kelso prison was sold privately at £200, the upset price having been £120. The prisons of Helensburgh, Dunbar, Stonehaven, Nairn, Peebles, Tain, and Kinross had been previously sold. Banff prison was exposed at £720, but no offer having been made, the sale was adjourned.

Law Agents Act.—The stated October quarterly examinations were carried through by the board of examiners under this Act on Tuesday and yesterday. Out of 32 applicants who presented themselves for examination in law, 15 were found qualified; out of 34 applicants who presented themselves for examination in general knowledge, 25 were found qualified; and out of 86 applicants who presented themselves for an entrance examination in general knowledge, 54 were found qualified.

The Scottish Law Magazine and Sheriff Court Reporter.

PERTH SMALL DEBT COURT.

Sheriff-Substitute BARCLAY.

A. v. B.

Master and Servant—Dismissal of servant for disobedience to orders—Justification of disobedience—Cruelty to animals.—The facts are stated in the notes of the Sheriff-Substitute.

The pursuer was the engaged servant of the defender at his farm of Keithick from Martinmas 1877 to Martinmas next at the money wages of £33, with the usual allowance of meal and milk. The first half year's wages were paid. The pursuer was dismissed by the defender's grieve on 27th August last. The defender is (perhaps unfortunately) non-resident on the farm. The pursuer sues for "£12 as loss and damage for breach of contract."

The defender admits the terms of the bargain, and also the dismissal by his grieve. But he justifies that act by reason of disobedience of orders of the grieve his master. The pursuer admits the disobedience, but avers that the order was unreasonable and unlawful. Perhaps the *onus* was thus shifted, and it lay on the pursuer to prove that the order was unreasonable. But that question was not raised, and the defender was allowed to lead in the proof.

The facts are these: There are four pairs of horses on the farm. The pursuer had charge of a pair, one of which was an aged horse (but how old did not appear). At the time of the dismissal this horse had two considerable sores on its neck, and one on the breast. The horses had not been fed on corn since the time of turnip-sowing, and were in consequence thin and in ill condition. The pursuer's horse was particularly so in addition to its sores. The pursuer and some of the other servants complained to the grieve of the want of feeding-corn. The pursuer had worked the pair of horses some days at a reaping-machine, which is proved to be very hard work. It is proved that the horse in question in its work perspired much more than the other horse, and was exhausted. A neighbour who saw the pursuer at work remonstrated with him for working a horse in such a state and condition, and termed it "cruelty to animals." On the 27th August the pursuer was ordered to begin work with the same horse but refused, saying he would not, but would do so with another horse. Another horse could not be given him without disturbing the arrangements of the farm. The grieve told the pursuer to take a smaller collar for the horse which might not come in contact with the sores, and such collar could have been got on the farm. But it does not appear that the substitution of another collar would remedy the evil if the horse was put to work. The grieve peremptorily ordered the pursuer to work the horse, using rather rough language in reference to the animal, and the pursuer still refusing, he was instantly dismissed.

One fact is much in favour of the pursuer, that he was proved to have been a good servant, and the grieve had no previous complaints against him, so he was not likely to take some trivial objection to violate his engagement. The pursuer on the day of the dismissal sent from Perth a veterinary surgeon to inspect the animal, and who deponed that it was perfectly incapable for the work, and that the pursuer to have worked it in that state would have been an act of cruelty to animals which would render him subject to penalties. The sending a veterinary to inspect shows that the pursuer was anxious to vindicate his conduct by obtaining the best evidence possible as to the condition of the horses. On the following day the grieve sent for another veterinary surgeon from Couper Angus, who inspected the horse, and deponed to the existence of the sores, but that notwithstanding the horse was quite capable for the work intended. Thus the two surgeons exemplify the maxim of diversity of opinion in medical classes, and that more especially where equine and bovine subjects are concerned; also that other fact that persons called in on one side, and for a certain purpose, perhaps unwittingly favour the side who has called them. The Sheriff is inclined to give little effect to the professional evidence so contradictory, and to consider more the proof of witnesses accustomed to deal amongst horses. Nevertheless the Perth veterinary has had much more experience than he from the country, and is Inspector for the city of Perth under "The Cattle Diseases Act." It would have been well that the veterinaries had actually seen the horse at work, which neither of them did.

The horse which the pursuer refused to work was worked next day by the grieve and his son, but the latter was not one of the force of the farm. One

of the servants also worked the animal at the same work, and these three witnesses agreed in testifying to the ability of the horse to perform the work. But although the horse may have satisfied them, it by no means follows that it was fully fit for its hard work, or that the pursuer under the circumstances was obliged to work such an animal contrary to the principles of humanity. It was important to notice that almost all the other servants who had no interest in the matter, and are still in the defender's employment, with more or less hesitation acknowledge that they would not on that occasion have worked the animal in its existing condition of weakness aggravated by the sores. The Sheriff would have been much better satisfied had the horse been placed in the hands of a respectable farmer, and thus tested by a neutral person who may have seen it at work.

A farmer is bound to give his servants fit means and implements for performance of his work. The servant must not be critical and capricious in his choice, or be encouraged to make trivial and frivolous objections. But on the whole evidence, and after anxious consideration, the Sheriff has come to the conclusion that the pursuer under the whole circumstances had good reason to object to work the horse in such a weak state, and with grievous sores, in labour requiring much strength and vigour, and that therefore the order of the grievance was unreasonable, and the dismissal on refusal to obey was unjustifiable. Decree entered for £10 and costs.

HUGH BARCLAY.

Act.—Mitchell.—Alt.—M'Cash.

SHERIFF COURT OF DUNDEE.

Sheriff CHEYNE.

DEWAR v. THOMSON and FARQUHARSON.

Pawnbrokers Act, 1862—Competing title to pledged property.—In the Dundee Sheriff Court some time ago an action of multiplepounding was raised at the instance of Mr. Dewar, superintendent of police, against James Thomson, pawnbroker, Peter Street, and Mr. Farquharson, treasurer of police, regarding the possession of a ring; and Sheriff Cheyne has just issued the following interlocutor and note, which explain the circumstances of the case:—

"Dundee, 18th September 1878.—The Sheriff-Substitute, having heard parties' procurators and considered the process, under reference to the accompanying note, prefers the claimant, James Thomson, in terms of his claim, and ordains the ring forming the subject *in medio* to be delivered up to him; and, in respect that the action was a friendly one of consent, finds no expenses due.

"JOHN CHEYNE.

"Note.—The circumstances of this case are as follows:—On the 19th June 1875 a diamond ring of considerable value was offered in pawn by a young man (name unknown) to Mr. Thomson, a pawnbroker in Dundee. Mr. Thomson having, as he states, his suspicions that the ring had been improperly come by, asked the young man to leave it with him for a day or two, on the pretence that he wished to ascertain its value. The young man complied with this request; but as he did not return, Mr. Thomson handed the ring over to the police, with a view to their making inquiries about it. Three years have elapsed, but no one has appeared to claim the ring, nor have the police obtained any information as to the person who brought it to Mr. Thomson, or tending to show that that person had improperly come by it. In these circumstances this multiplepounding has been raised for the purpose of having it determined what is to be done with the ring, or, in other words, whether it is to be restored to Mr. Thomson, or is to be disposed of by the Police Commissioners under section 330 of the General Police Act of 1862, incorporated with the Dundee Police and Improvement Act, 1871. Now I must confess that at the discussion I was a good deal impressed by Mr. Barnett's argument, founded upon the statutes, and was inclined to hold that Mr. Thomson, having taken possession of the ring in discharge of a duty laid upon him by statute, and

having dealt with it as the statute directed, had ceased to have any concern with its disposal, and consequently had no title to claim it; but, on looking into the statutory provisions cited, I find that only one of them has any real bearing on the case, and thus it does not solve the question now raised; and I have ultimately come to be clearly and decidedly of opinion that Mr. Thomson's claim must be sustained. The statutory provision which I have spoken of as the only one having a bearing upon the case is contained in section 34 of the Pawnbrokers Act of 1862, which enacts *inter alia* that 'in any case where, on an article being offered in pawn to a pawnbroker, he reasonably suspects that it has been stolen or otherwise illegally or clandestinely obtained, the pawnbroker may seize and retain the person and the article, or either of them, and shall deliver the person and the article, or either of them (as the case may be), as soon as may be, into the custody of a constable, who shall as soon as may be convey the person if so detained before a Justice, to be dealt with according to law.' That is the section under which Mr. Thomson acted, and the only section under which his action can be justified; but it, it will be observed, is silent as to what is to be done in the case which has arisen here, viz., where the article alone has been detained, and no information has been got confirmatory of the pawnbroker's suspicions. In such a case the police are clearly not in a position to charge the article as having been stolen or unlawfully obtained; and therefore it cannot, in my opinion, be dealt with under section 330 of the General Police Act of 1862. Accordingly, even if there were not in the present case the specialty to which I shall immediately advert, I would be inclined to say that, a reasonable time having been allowed for inquiry, the police authorities, their inquiry having proved abortive, are not only entitled but bound to deliver the ring up to the party who handed it to them, and who, at all events, has a title to it preferable to theirs. In the present case, however, it is to be noticed that Mr. Thomson obtained possession of the ring, no doubt on a false pretence, but still with the consent of the person who must now be presumed to have been the true owner; in other words, he held it, at the time when he gave it up to the police, on a recognised contract—the contract of deposit,—and it seems to me that he has precisely the same title now to demand its redelivery to him as he would have had had he actually taken it in pawn, in which case his claim could hardly have admitted of doubt. It was urged that Mr. Thomson, if his claim was sustained, would proceed at once to realize the ring; but that is obviously a consideration which cannot affect my decision.

J. C."

SHERIFF COURT OF STORNOWAY.

Sheriff-Substitute SPITTAL.

TAIT & SON v. ADDISON.

Shipping—Bill of Lading—Sheet delivery—"Quality and quantity unknown."

—The facts of this case appear from the following note of the Sheriff-Substitute:—

"*Notes.*—In April 1878 Robert Addison, master and part-owner of the *Sophia*, entered into a charter-party with Tait & Son of Inverurie, whereby he undertook to convey a quantity of meal in bags from Aberdeen to Loch Roag and Stornoway for the slump sum of £30. Bills of lading were duly prepared, bearing that 225 sacks of oat and bere meal were shipped for Stornoway, and 270 sacks of oat and bere meal for Loch Roag. These bills are produced, bearing above the signature of Addison the words 'quality and quantity unknown.' The *Sophia* proceeded on her voyage, and duly landed the proper number of sacks at Stornoway, to which port she was directed first to proceed, but at Loch Roag she only landed 266 sacks, being four sacks short of the proper number.

"Tait & Son now sue Addison for the value of these four sacks. Addison's

defence is that he delivered at Stornoway and Loch Roag all the sacks actually shipped on board the *Sophia* at Aberdeen; and that the words in the bills of lading, 'quality and quantity unknown,' free, and were meant to free, him from liability in the possible event of short delivery of sacks. He says in his evidence that he told the broker's clerk at Aberdeen that he had not counted the sacks at shipment, and proposed to add the words quoted in order to keep himself safe, and that these words were accordingly added for that purpose by M'Lachlan the shipbroker before the bills were signed. Now this is entirely corroborated by the broker, who says (proof, page 20): 'I added the words to the bills "quality and quantity unknown." When I wrote these words I intended them to apply to the number of sacks.' Again, at page 52, he says, 'When I presented the bills No. 3 and 4 to the captain for his signature, he declined to sign them until he should first put such a reservation upon them as he thought would keep himself clear of liability for the number, and also for the quality. I thereupon, with that in view, wrote upon the bills the reservation quality and quantity unknown. It was on the faith of this reservation and my explanation of it that it would keep him free that he signed the bills.' The defender, besides his own evidence, adduced the mate and another of his men to prove that all the sacks shipped were delivered at the ports of delivery; the pursuers, on the other hand, leading evidence for the purpose of showing that the whole number of sacks named in the bills were put on board at Aberdeen. On the evidence it appears to me that the pursuers have failed to prove fault on the part of the defender in regard to the short delivery, and that the mistake as to the number of sacks occurred at the port of shipment. A nice question of law was raised as to the precise effect of the words 'quality and quantity unknown' where the cargo was contained in a definite and ascertainable number of sacks, that number being stated in the bills of lading. But I am of opinion that here that question does not arise purely for decision. The defender and the broker concur in saying that these words were added for the express purpose of freeing the defender from liability for the stated number—no fault of course being proveable against him—and in these circumstances I am of opinion that the defender is entitled to absolver with expenses. Decree accordingly pronounced."

Act.—Ross.—Alf.—Campbell.

SHERIFF COURTS OF BANFF AND ELGIN.

Sheriff-Substitutes SCOTT MONCRIEFF and SMITH and Sheriff BELL.

Petition, SELLAR.

Sheriff—Jurisdiction where counties have been united—Prison Act 1877—Cessio—Act of Grace.

James Sellar, residing in Banffshire, was imprisoned under a warrant following upon a decree of the Sheriff Court of that county. As there is now no prison in Banff, Sellar was sent to Elgin, and there presented a petition for alimony in the Sheriff Court of Banff.

Upon this petition the Sheriff-Substitute pronounced the following interlocutor:—

"*Banff, 22nd July 1878.*—The Sheriff-Substitute having considered the foregoing petition, and heard the petitioner's procurator thereon for the reasons contained in the subjoined note, refuses the prayer of the petition, and decerns.

"W. G. SCOTT MONCRIEFF.

"*Note.*—The counties of Banff and Elgin are under the Act 33 & 34 Vict. c. 86, §. 12, one jurisdiction and Sheriffdom (although for convenience separate Courts are located in different places within their boundaries). It is therefore very clear that the power to deal with the present application conferred by Act 7 & 8 Vict. c. 34 may be exercised by the Sheriff-Substitute at

Elgin, and it is in the circumstances of the present petitioner highly inexpedient that he should be brought from Elgin to Banff. W. G. S. M."

Sellar then applied to the Sheriff-Substitute of Elgin, whose interlocutor was, as follows :—

"*Elgin, 23rd July 1878.*—The Sheriff-Substitute having considered the foregoing petition, and heard the procurator for the petitioner thereon, refuses the prayer thereof, dismisses the petition, and decerns. D. MACLEOD SMITH.

"*Note.*—The petitioner is domiciled in Banffshire, and is imprisoned in the prison of Elgin, which has been made, under the recent Prison Act of 1877, the prison for Banffshire as well as for Elginshire. The 70th section of that Act provides that nothing therein contained shall alter the law with respect to the aliment for civil prisoners, or with respect to the jurisdiction possessed at the time of the passing of the Act by Sheriffs or magistrates on that subject. At the time of the passing of the Act the petitioner, as being domiciled in Banffshire, was not liable under the diligence against him to be imprisoned, except in the prison of Banff, and if so, the jurisdiction in regard to his aliment belonged to the Sheriff Court of Banffshire, cumulatively with that of the magistrates of the burgh of Banff, in which the prison of Banff is situated. This jurisdiction does not appear to be altered by making the prison of Elgin to be also the prison of Banff for the purposes of the county of Banff, and the burghs and towns included within it. On the contrary, these jurisdictions, as existing at the time of the passing of the Act, appear to be expressly reserved by the section of the Prisons Act which has been quoted, and the jurisdiction for the prison of Banff appears to be still in the hands of the Sheriff Court and magistrates of Banff, wherever the prison itself may be located for the time.

"It is maintained for the petitioner that under the union of counties which has taken place under the Sheriff Court Act of 1870, the Sheriff Court of Elginshire has now cumulative jurisdiction with the Sheriff Court of Banffshire in all matters competent to the Sheriff Courts of any part of the united Sheriffdom. That agreement, however, cuts two ways, because if either Court has the same jurisdiction, the question appears more appropriate to the Sheriff Court of Banffshire, to which in this case debtor and creditor and agents and all concerned belong, than to the Sheriff Court of Elginshire, to which none of them belong. The true meaning of the clause of union appears rather to be to put the whole counties of the united Sheriffdom on the same footing as some of the large counties, such as Inverness, Ross, etc., which are divided into districts, but which in other senses are one united Sheriffdom. In the cases of these large counties, each Sheriff-Substitute has his commission for the whole county, but none of them exercise jurisdiction for any district except their own, unless at the time they are personally within the jurisdiction for which they may be so acting. In the same way, under the union effected by the Act of 1870, the Sheriff-Substitute of Elginshire can act in Banffshire, or the Sheriff-Substitute for Banffshire can act in Elginshire, or in regard to Elginshire, but for these purposes each must go personally for the time to the county of the other. A person subject to the jurisdiction of Banffshire cannot, as matter of ordinary procedure, be made defender or respondent to an action in Elginshire, or *vice versa*. In the present case the respondent to the present petition, if I entertained it, does not appear to be in any way amenable to the Sheriff Court of Elginshire, and it would be apparently *ultra vires* of this Court to pronounce any award which might affect the respondent, or the agents for the respondent, who are all beyond its ordinary jurisdiction.

"The present question is administrative as well as judicial. When the former element is involved, the officials who have to deal with such procedure are presumed, in regard to modes and facilities of intimation and the like, to go in their own district to a certain extent upon local and personal knowledge, which they may not possess in regard to another county or district, and thus to avoid much inconvenience, expense, and hardship which might be otherwise occasioned.

"The distinction in regard to criminal prisoners confined in 'Elgin Prison, used as the prison of Banffshire, and belonging to the jurisdiction of Banffshire, has been already recognised in practice under the Act of 1877. Petitions by such prisoners for bail, and the carrying out of caution when bail is granted, and other relative proceedings, are all carried on through the authorities of Banffshire. It has not been suggested that the law authorizes them to be dealt with in any other way. It is not easy to see why civil prisoners should be dealt with on a different footing.

"If the present application would not lead to any consequences beyond the awarding of aliment, it would not be worth while raising any difficulty; but as the award of aliment may be followed by an application for liberation if the creditor fail to supply the aliment, and as any illegality in that matter might lead to serious results, it is necessary to examine the position from the outset.

"The present petitioner has applied in the Sheriff Court of Banffshire for liberation under the process of *cessio*. It is understood that this process of *cessio* is still depending there, and that no objection has been made to the competency of it on the ground of jurisdiction. D. M. S."

The petitioner also appealed to the Sheriff of the united counties, who, upon 14th August 1878, recalled the interlocutor of Sheriff Scott Moncrieff, sustaining the jurisdiction of the Banff Court, and remitting the case to the Substitute there "to do further as may be just."

The Sheriff-Substitute then remitted the case to Elgin to have the necessary declaration required under the Act of grace taken before the Sheriff-Substitute there as commissioner, which was accordingly done.

Agent.—Hossack.

Notes of English, American, and Colonial Cases.

CHARTER-PARTY.—*Warranty of class—Cancellation of certificate of classification after charter.*—Plaintiffs chartered a ship to defendants. The charter-party was headed "A 1½ on the record of the American and Foreign Shipping Book," and in the body of the document she was described as "classed as above." At the time of chartering she was actually so classed, but afterwards and before loading she was found to have been wrongly classed, and her certificate of classification was cancelled. Defendants thereupon refused to load:—*Held*, that there had been no breach of warranty on the plaintiff's part, and that defendants were bound to load in accordance with the charter.—*French & Son v. Newgass & Co.* (App.), 47 L. J. Rep. C. P. 361.

ELEMENTARY EDUCATION.—*Application for formation of School Board—Voting at preliminary meeting—Personation—Rules ultra vires.*—The personation of a voter at the election of members of a School Board is made an offence by the second schedule to the Act of 1873, 36 & 37 Vict. c. 86, which applies the Ballot Act of 1872 to such election, but does not apply it to the voting upon a resolution for application for a School Board under sec. 12 of 33 & 34 Vict. c. 75.—*R. v. Sankey*, 47 L. J. Rep. M. C. 96.

The personation of a voter at a poll for passing a resolution for application for a School Board is not an offence under the Elementary Education Acts, and a regulation of the education department of the Privy Council constituting such personation a misdemeanour punishable on summary conviction will not support a conviction, it being a regulation *ultra vires*, and one not made valid by sec. 84 of 33 & 34 Vict. c. 75.—*Ibid.*

THE JOURNAL OF JURISPRUDENCE.

ON THE LIABILITY OF TRUSTEES.

THE doctrine laid down by the House of Lords in the case of *Lumsden v. Buchanan* (22nd June 1865, 3 Macph. H. L. 89), to the effect that trustees who embark trust funds in any trading concern are personally and individually liable, not only *in solidum* to creditors, but in relief to their copartners, is undoubtedly in conformity with the well-settled law of England on the subject, and affords a salutary warning to trustees not to venture into speculations which may prove disastrous both to themselves and the beneficiaries. Seeing, however, that the soundness of the decision has frequently been questioned, and that eight out of the twelve Judges who gave opinions in the case in the Court of Session (26th Feb. 1864, 2 Macph. 695) held that trustees in these circumstances might quite well escape personal liability, at least in a question *inter socios*, we shall venture, with all deference to the two Judges who decided the case in the House of Lords (Lord Kingsdowne, the third, being practically neutral), and to the minority of four in the Court of Session, to inquire whether the final judgment in the case was in accordance with Scotch law.

The facts were shortly as follows: The pursuer, the liquidator of the Western Bank, a joint-stock company with unlimited liability, which failed in 1857, sued the defenders, the six marriage-contract trustees of Mrs. Ellen Brown of Glasgow, for payment of a call of £7500 in respect of sixty shares held by them; but he admitted that the whole of the company's debts had been paid, and that the sum concluded for was to be devoted to equalizing the loss *inter socios*. He pleaded that the defenders, as partners of a trading company, were liable both *in solidum* to creditors and in relief to their copartners; to which the defenders replied that they had become members of the company *quod* trustees, and were not liable beyond the extent of the trust funds. By their trust-deed the defenders were authorized to invest the trust funds in (*inter alia*) bank stock, and they were expressly exempted from all personal liability except in the case of wilful fault. They accordingly in

1846 bought sixty fully paid-up shares in the Western Bank from the directors themselves, the price completely exhausting the trust fund. All the six trustees concurred in the purchase, but five of them only signed the contract of copartnery, being designed in the testing clause as "a quorum of the trustees for Mrs. Ellen Brown." In many other cases the contract had been signed by individuals described in the testing clause as trustees, sometimes by the whole body of trustees, sometimes by a quorum, and in other instances by one of the trustees for himself and his co-trustees, and in others again by the manager or the secretary of the bank as mandatory for the trustees. There were also numerous cases in which parties had signed the contract as holders of shares in their individual capacity, and of other shares in the character of trustees. The defenders were described as trustees, not only in the testing clause of the deed signed by them, but in the company's stock ledgers, in the share certificate (which bore the names of all the six), and in the returns to the stamp office.

Besides the bank's original contract of copartnery, entered into in 1832, there were three deeds of accession of later date, one of which was signed by five of the defenders. Each of these contained a clause to this effect: "We, the several parties hereto subscribing (for ourselves individually, or as representing companies incorporated or unincorporated), have acceded to and adopted" the contract of copartnery. And we "do hereby unite and associate ourselves (or our said constituents) into copartnership" as a joint-stock banking company, "and we bind ourselves, and our respective heirs, executors, and successors to exert our utmost diligence" in promoting the interests of the company, "it being understood that we, the several parties hereto, or corporations or copartnerships admitted as partners, . . . shall in every view be deemed and taken to be members of the company." The third article of the contract declared that the holding of shares "shall constitute the rights and infer the liabilities of partnership," and that the shareholders "shall be bound, and hereby bind and oblige themselves and their aforesaid, respectively, to free and relieve each other of the whole debts" of the company.

Without entering minutely into the details of the elaborate arguments on both sides, and of the twelve opinions delivered in the case in the Court of Session and the three delivered in the House of Lords, we may briefly summarize the leading arguments as follows:—

I. Against the trustees.—(1.) Trustees entering into contracts are personally liable for all the consequences of their engagements; and justly so, as they ought to know whether the trust funds are sufficient for the fulfilment of their obligations, and are therefore held as guaranteeing sufficiency of funds. This has been ruled in Scotland in obligations under bills and under various contracts of buying, hiring, etc.

(2.) Two classes of shareholders only are recognised—1st, Individuals; 2ndly, Corporations or copartneries. A trust is neither a corporation nor a copartnery. The trustees are therefore liable as individuals; and this view is confirmed by the fact that they have bound themselves and their “heirs, executors, and successors.”

(3.) The admission to the company of two classes of shareholders, one with limited, and the other with unlimited liability, would be unjust, repugnant to the nature of the contract, and incompetent.

(4.) The contention of the trustees that their liability is limited to the value of the trust funds would lead to the unjust result that their copartners would be liable to indemnify them for any calls they might have paid beyond the extent of the trust fund.

(5.) The liability of trustees may be limited to the extent of the trust fund by express stipulation; but in this case the description of the defenders in the testing clause and on the register as trustees was intended, not to alter or control the principal contract, but merely to mark the property in the shares as belonging to the trust estate.

II. For the trustees.—Ans. i. Trustees in Scotland, acting within their powers, are usually held liable *quod* trustees only; and it is only on the exceptional grounds of personal misconduct, or of express or implied guarantee of the sufficiency of the funds, that they are held personally liable. All the cases cited were decided on one or other of these exceptional grounds. As in the present case they acted within their powers and fully paid for their shares, there was no farther liability, except in the highly improbable event of the whole funds being lost and additional debts incurred. No one who becomes a member of a company of this kind, and fully pays for his shares, can possibly guarantee that he will reserve funds to meet all possible losses. The trust fund, which the defenders believed to be the shareholder, happened in this case to be exhausted; but it was in no worse position than many an individual shareholder who has thus invested his all and is unable to contribute more.

Ans. ii. The trustees were accepted, if not as creditors by the public, at least as partners by the bank in their fiduciary character, and they may justly be regarded as the mandatories or servants of a kind of corporation or jural person whose liability is either limited to the amount of its funds, or at all events cannot extend to the trustees. That trustees may act as a kind of corporation with limited liability was recognised by the House of Lords in the case of *Campbell v. Gordon* (13th June 1842, 1 Bell's App. 428). The fact that they bound themselves and “their respective heirs, executors, and successors” no more points to personal liability than the fact that the mandatories bound themselves in the same way. The “*respective* heirs, executors, and successors” are obviously, *applicando singula singulis*, the heirs and executors of individuals and the successors of jural persons respectively. In the present case

the trustees, like other persons signing in a representative character, must be held merely to have bound themselves and their successors in office to fulfil their ministerial duties.

Ans. iii. Corporations, with liability limited to their corporate funds, may be partners, and trusts are in an analogous position.

Ans. iv. From the admittedly competent introduction of corporations as partners it necessarily follows that individual partners may in some cases be required to pay calls which corporations with limited liability might be unable to meet.

Ans. v. The adjection of the description "trustees" to the names of the defenders in the testing clause and in the register could have, in accordance with the general understanding and practice of the legal profession in Scotland, no other import than that they intended to contract *quod* trustees, and thus to limit their liability to the extent of the trust fund; and there can be no reasonable doubt that the directors accepted them in their fiduciary and representative character. Their names appeared in the register and were frequently published in the newspapers with the same designation, so that the public also were fully cognizant of their fiduciary character.

Such, approximately, were the principal arguments actually marshalled on each side of this important and interesting case, and, at first sight, those which finally prevailed in the House of Lords appear the more cogent. One of them, however, the third, which was specially emphasized as a ground of judgment by the Lord Chancellor (Westbury) and by the other Judges who used it, seems on closer examination to be really based on an inaccurate and popular use of words, and to conjure up a purely imaginary injustice; while the others, we venture to think, will be sufficiently disposed of by a slight amplification of the respective answers already stated.

As we propose to treat the case strictly as a question of Scotch law, we may concede at the outset that the judgment was quite in conformity with the law of England, of which, however, we deny the applicability. While in Scotland the fee and management of a trust estate are vested solely in the trustee, there is in England an equitable estate in the *cestui que trust*, or beneficiary, coupled with a certain power of control, and in some cases with actual possession. In Scotland the trust usually devolves on a series of trustees successively assumed, while it descends in England to the heirs of deceasing trustees. In Scotland, moreover, trusts may be termed a favourite of the law, the aid of which is easily invoked and readily granted for the purpose of enforcing their purposes, and the principles regulating them are easily intelligible; while in England trusts do not seem to be regarded with so much favour, and the law regulating them and its procedure is, to say the least, very complicated.¹ Another difference is pointed at by the Joint-Stock

¹ Of a trust in England it has been said that its "parents were Fraud and Fear, and a Court of Conscience was the nurse;" and a trust in that country

Companies Act, 1856 (19 & 20 Vict. c. 47, s. 19), by which English companies are expressly prohibited from entering any notice of trust on their registers, a prohibition which does not extend to Scotland.

The eight Judges who formed the majority in the Court of Session held that it was unnecessary to decide more than that the trustees were not personally liable in a question *inter socios*; but we shall endeavour to maintain the wider proposition that there were no good grounds for holding them personally liable either in a question with copartners or creditors.

In order to simplify the discussion, we may fairly reduce the leading grounds of judgment to two :—

a. As a trust is not a person, it cannot be a shareholder. The trustees whose names appear on the register must therefore be liable as individuals.

b. To admit shareholders with unlimited and others with limited liability is unjust, as the former would have to pay the calls which the latter were unable to meet,

These arguments may be shortly answered thus :—

Ans. a. A trust is a jural person and may be a shareholder like a corporation or a copartnery. The trustees, though by a fiction of law the legal proprietors of the trust estate, have no beneficial interest, and, as their functions are merely ministerial, they ought to be as exempt from personal liability as the servants of a corporation or copartnery.

The law of Scotland, like the Roman law, has always recognised the existence of jural or fictitious persons, which have been defined as “physical entities capable of enjoying rights and performing duties,” and managed or represented by one or more individuals acting in a capacity quite distinct from their private *personæ*. As familiar examples may be mentioned corporations, copartneries, charities, and clubs, to which may be added the *hereditas jacens* of Roman law (D. 46, 1, 22). If the jural person be a corporation erected by Royal Charter or Act of Parliament, or a “limited” company, the liability of its members is restricted to the amount of the corporate funds, while in other cases it extends to the full amount of their private fortunes; but in both cases, whether the loss be merely that of the corporate fund along with the benefits of the institution, or with contributions from the private funds of the members superadded, it is one of the *incommoda* to which members who have enjoyed the *commoda* are alone exposed. In no such case, however, can a manager, or clerk, or secretary to the jural person, who obeys its laws, be held personally responsible for its acts, unless he be at the same time one of its proper members. In all these cases the fee of the corporate or common estate is

is lucidly defined as “a confidence reposed in some other, not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land, and to the person touching the land, for which the *cestui que trust* has no remedy but by *subpana* in Chancery” (Lewin, pp. 2, 13).

vested in the *persons* of the corporation or community, represented by its officials for the time being, and not in these persons as individuals. Now, although by a fiction of law a trust estate is the legal property of the trustees, a trust (assuming it to be for a *bond fide*, legitimate, and well-recognised purpose), not unlike the *hereditas jacens* of Roman law, seems rather to possess all the attributes of a jural person. The estate is specifically set apart for certain well-defined purposes, and is managed by individuals who derive no benefit from it. The law of the trust is laid down by the truster, who of course ought to be held responsible for its soundness, and the benefits of the institution are enjoyed by the beneficiaries, while the trustee, so long as he obeys his instructions and is guilty of no misconduct, is the mere servant or hand of the founder and all the parties interested, and can in no proper sense be justly regarded as the proprietor of the estate. As, however, to prevent uncertainty regarding the fee of the estate, it is nominally vested in the trustee, who is thus interposed between creditors and the other parties beneficially interested, it might reasonably be held competent to creditors, in cases like the present, not only to sue the trustee for payment out of the trust fund, but compel him on their behalf to sue the truster and his heirs and the beneficiaries for any deficiency caused by a use of the trust funds which they had respectively sanctioned and benefited by. In this way the parties really and justly liable would be reached through the trustee, whose sole duty would be the faithful discharge of his ministerial functions. The position of a private trustee, in short, would then be assimilated to that of the liquidator of a public company, or the law agent of a corporation, who act as mere channels of business to the various parties interested, and are in no case clothed with the *persona* of the institution they represent.

If then a trust estate is in its leading characteristics a jural person, and not in any true sense the property of the trustees, it would seem quite as eligible a shareholder in a joint-stock company as a corporation or a copartnery, and to admit it as such is nowhere said to be incompetent. That such was the general understanding in Scotland with regard to the rights and duties of a trust prior to the case of *Lumsden v. Buchanan* seems certain, though, as pointed out by Lord Barcaple, these views have never been expressly or judicially enunciated. If we have succeeded in establishing our proposition, it follows that the judgment in question was erroneous and unjust. It was erroneous, according to our contention, to regard the trustees as mere private individuals, and unjust to hold the liability in respect of the trust shares to attach to mere servants who had acted in perfect good faith and had derived no benefit from the transaction. On the other hand, if there was any doubt as to the intention and understanding of the contracting parties, some inquiry should have taken place, in order to prove or disprove the general understanding for which we are contending. We may,

however, fairly assume as absolutely certain what was never denied throughout the case, viz. that the trustees at least believed they were contracting *quid* trustees, i.e. as a jural person with perfect immunity from personal risk; in which case it was unjust to enforce a contract induced by essential error.

Ans. b. There already exist two classes of shareholders in the bank, individuals with unlimited and corporations with limited liability. The admission of the latter class is no injustice to the former, as corporations are at least as likely to have a reserve fund as individuals, and trusts are in an analogous position. There is, on the other hand, great injustice in holding a number of trustees and their trust fund (so far as they can obtain relief from it) all liable *in solidum* in respect of a number of shares for which in other cases a single individual only is liable. For the purposes of the case, however, it is unnecessary to maintain that the liability is limited, like that of a corporation, to the extent of the trust fund. The liquidator may require the trustees to sue those who sanctioned and those who benefited by the investment to make good any deficiency of the fund.

The expression "unlimited liability" usually conveys to the popular mind an idea of exhaustless credit and impregnable stability, but this unbounded liability in the case of individuals is just as really limited as the liability of corporations and "limited liability companies." Every one's liability is measured by what he possesses, and so too is that of corporations and companies, the chief difference being that it is usually difficult to ascertain the amount of the estate of an individual, but easy to ascertain the condition of a company's funds. An individual, moreover, is more likely to embark the whole of his funds in a trading company than a corporation or jural person, so that the reserve fund implied by his "unlimited liability" may simply be *nil*, while the corporation with its "limited liability" may quite easily be in a position to pay every call, and have to suffer for the shortcomings of its "unlimited" copartners. A trust would therefore seem quite as eligible a partner as an individual, especially if the truster, his heirs, and the beneficiaries were held liable *subsidiarie* for its liabilities. It is therefore obvious that the supposed injustice of admitting a trust as a shareholder, even were its liability limited to the extent of its estate, is quite imaginary, a trust being at least as likely to have a reserve fund for contingencies as an individual. In fact, in the lottery of unlimited liability, it is unjust to every wealthy shareholder to admit a poorer; and, as in public companies, there is practically no *delectus personarum*, and as no one who pays for his shares in full can be rejected, it follows that every partner must run the risk of his copartners being less able to pay calls than himself. In order to introduce anything like equality among the shareholders each should be required to find caution for a large sum in addition to every fully paid-up share;

but, as such a scheme would be unworkable, it is clear that the only absolutely just system is that of limited liability with fully paid shares. So long, however, as unlimited liability companies exist, there must necessarily, in the event of bankruptcy, be great inequalities among the members, the richer being the greater sufferers; so that it would obviously be far more unjust to admit a poor individual than a wealthy trust. In their anxiety to avoid the supposed injustice of admitting a trust as a shareholder, the House of Lords, as pointed out by Lord Kingsdowne, committed a real and palpable injustice. While, in a case of serious loss, the individual holder of a given number of shares is alone ruined, the result of the judgment is that a trust, holding the same number, may not only itself be exhausted, but may cause the ruin of half-a-dozen trustees, who have derived no benefit, and yet have to pay for risks run by the truster and the beneficiaries, and also for the shortcomings of the other partners. Such is the "equality among shareholders" which the judgment was designed to introduce!

These two answers, we venture to think, dispose of the two leading arguments against the trustees, but one or two other points in the case must also be briefly noticed. Lord Cowan thought that the trustees had a good claim of relief against the beneficiaries. In some cases, no doubt, trustees might thus operate their indemnification, but in many others the remedy would be worthless. In our view the fund should be primarily liable, and the truster and his heirs and the beneficiaries *subsidiarie*, while trustees obeying the law of the trust and acting in good faith should enjoy absolute immunity. The same learned Judge was under some misapprehension as to the statute law on the subject. He seems to have relied on 19 & 20 Vict. c. 47, s. 19 (the Joint-Stock Companies Act, *not* the Winding-Up Act), which prohibits notices of trust being entered in the register or received by the company, and which declares that every person entered on the list of shareholders shall be liable as such; and he stated that this provision had been incorporated with the Joint-Stock Bank Act of 1857 (20 & 21 Vict. c. 49); but sec. 15 of the latter Act expressly declares sec. 19 of the Act of the previous year not to apply to Scotland. A similar prohibition of "notice of trust" in the Companies Act of 1862 (25 & 26 Vict. c. 89, s. 30) is, moreover, declared to apply to England and Ireland only. Lord Cowan also founded on the Joint-Stock Bank Acts of 1844 and 1846 (7 & 8 Vict. c. 113; 9 & 10 Vict. c. 75); but these were both expressly repealed by sec. 12 of the Act of 1857. Any assistance derivable from statute law is, therefore, entirely in our favour. As "notice of trust" is thus admissible to the register of a Scotch company, the Legislature itself recognises bank stock as a possible investment for Scotch trustees to make, though it is silent as to their liability. This permission, it is clear, is entirely valueless to trustees unless it affords them protection against personal liability; while the carefully enumerated, and in every document

anxiously reiterated, lists of trustees and their respective quorums point as clearly to the general understanding that they were thus protecting themselves against personal risk, and not merely seeking "to identify the trust property." Great stress was also laid by some of the Judges on the supposed impossibility of a bank being founded with trust funds exclusively, and managed by trustees without personal responsibility. Improbable though it be that such a scheme should ever be attempted, or that it would command the confidence of the public, there seems no reason to doubt its competency, provided every customer distinctly agreed to its conditions. Nor would the risk in reality be one whit greater than that often incurred by the creditors of corporations. Another point worthy of notice is, that the five trustees who actually signed the contract were alone held liable, while the sixth, who had concurred in the purchase of the shares and in drawing the dividends, and whose name appeared on the register, entirely escaped. So narrow and technical a ground of judgment would apparently lead to the startling and anomalous result that every trustee who had signed *factorio nomine* for himself and his co-trustees, and every mandatory, whether of trustees or of individuals, would alone be held personally liable, whereas the co-trustees and the mandants would escape. Such a result could of course only be reached in defiance of the principles of mandate and agency.

On these various grounds it appears to us that the judgment of the House of Lords in this case was based on unsound and fallacious arguments, chiefly derived from English law. For the purposes of the argument it is unnecessary to determine whether in such circumstances the truster and his heirs and the beneficiaries should or should not be held liable to make good any deficiency in the trust funds; but it seems clearly more consonant with reason and justice to regard the trust as a distinct jural person, primarily at least responsible for its own acts, both in questions with copartners and with creditors, and managed by trustees as the mere servants of all concerned, than to perpetuate the unnecessary and sometimes mischievous fiction that the trustees are the proprietors of the trust estate. While, however, we believe these views to be in conformity with the law of Scotland and with equity, we can hardly venture to hope, in the event of the question being reconsidered, that they will prevail against a judgment which has repeatedly been followed as a precedent during the thirteen years since it was delivered, although they may possibly suggest the desirability of some legislation on the subject.

J. K.

NOTES ON EDUCATION FOR THE SERVICE OF THE STATE.

III. HOLLAND.

THREE things have specially distinguished the Dutch since they threw off the tyranny of Spain, and made their small country hold a position of honour and influence in the commonwealth of Europe—a love of political liberty, toleration of difference in religion, and care for education. Though in the eyes of statesmen who rank nations according to the size of standing armies Holland may be of small account, its voice must be listened to with respect in any question which relates to the government of a free state or the arrangements of education in connection with it.

Long distinguished for the excellence of its schools, which Cousin said nearly half a century ago might serve as a model for other states, Holland has by recent laws reorganized its primary education in 1857, its secondary education in 1863, and its superior or University and High School education in 1876. Although in many points merely declaratory of the condition of things which existed when it passed, the Dutch Law of 28th April 1876 made some considerable improvements, and placed the whole system of the Dutch universities on a simple and clear basis, which renders it easily administered and easily understood. The courtesy of the Legation of the King of the Netherlands in London has placed at our disposal a valuable report entitled “*Organisation de l’Instruction Primaire, Secondaire, et Supérieure dans le Royaume des Pays-Bas*,” by Dr. D. J. Steyne Parvé, Leyden, 1878, and we purpose to communicate its results so far as it relates to legal education to our readers. Although it is only with the Faculty of Law we have here to do, some notice of the general scheme of university education is necessary to explain the position of that Faculty. Superior instruction (*l’instruction supérieure*) means, in the sense of the Dutch Law, education in the gymnasia or High Schools as well as in the universities, but we shall pass by its provisions on the latter head with the remark, that to deal with the whole subject of the higher education in a single law is not without considerable advantage to simplicity of organization. It enables the education of the schools to be fitted to the education in the universities, and the relation of the universities to the High Schools and their schoolmasters to be adjusted in a manner which, although now groping after it, we have not yet succeeded in seeing clearly in this country, much less in realizing.

The definition which the Law gives of superior instruction in its first title (Article 1) deserves to be quoted both for its own sake, and as showing the neatness of the Dutch draughtsmen in that difficult matter the preamble of a law. “*L’instruction supérieure*,” it says, embraces “*l’étude des sciences tant pour la culture intellectuelle en*

général que pour la préparation spéciale à l'exercice des fonctions et des professions qui exigent une éducation scientifique."

More than one controversy¹ which has been waged with many words by educational reformers in this century is set at rest by this simple definition. The university, according to it, is not an institution devoted to general intellectual culture exclusively, as is the case in England, neither is it devoted exclusively to special professional education, as it is for the most part in Germany. It combines both these objects, and this has fortunately continued to be the aim of the universities of Scotland. For the effect of the combination is to give the professional education a liberal and scientific character, while it recognises a general intellectual culture as the proper foundation for professional training.

The second chapter of the second title of the Law relates to the gymnasia or High Schools, a subject to which we do not propose to refer. The third chapter deals with the universities, and we give a brief summary of its provisions. It provides that there shall be three State universities, Leyden, Utrecht, Gröningen (Article 35), and that the municipality of Amsterdam may transform the *Athenæum Illustre* of that town into a university, on condition that the organization of this university shall comply with the prescriptions of the Law concerning the State universities as to the scope of the education, the confirming of degrees, and the conducting of examinations (Article 36).

As Amsterdam has taken advantage of this permission there are now four universities in Holland, a country whose extent is one-third less than Scotland, and whose population is only about 300,000 more than Scotland.² This fact affords a confirmation of the opinion of those who have held, notwithstanding much opposition, that the four universities which have been instituted in Scotland are not too many, for, as will be noticed presently, the number of students in Scotland is much more numerous than in Holland.

In each of the four universities there are the following five Faculties: (1) the Faculty of Theology; (2) the Faculty of Law; (3) the Faculty of Medicine; (4) the Faculty of Mathematical and Physical Science; (5) the Faculty of Letters and Philosophy (Article 41).

This division of the Faculties appears to be based on a sound conception of the present position of the different branches of knowledge. It avoids the error which has been made by some universities both in the middle ages, as in the case of Paris or Glasgow, and in modern times, as in the case of Oxford and

¹ See, for example, Mr. Mill's Address as Rector of the University of St. Andrews, in which it is argued that the universities should not educate for the professions.

² The census of Scotland in 1871 was 3,360,000, that of Holland in 1872 3,674,000.

Cambridge, of allowing the Faculty of Arts, or certain of the subjects within that Faculty, to overpower the other Faculties. It also avoids the error with which we are threatened in the future, of giving natural science an undue preponderance, whether by admitting it within the Arts Faculty or otherwise.

All the Faculties, or in other words, all well-established divisions of knowledge for the purposes of learning and teaching as well as for purposes of practice, are placed on an equality. The division of the old Faculty of Arts into two branches, the one for Mathematics and Physics, and the other for Letters and Philosophy, is specially well devised; for these two branches belong in the great majority of cases to minds of a different order, and are each of a sufficient range to form a thoroughly good scientific education.

There may indeed be a question whether the range is not too wide, and whether some further subdivision may not in the future be necessary. But allowing for a considerable degree of option within the several Faculties themselves,¹ it does not appear to be advisable as a general rule, and looking to the case of the majority of students, that the Physical Sciences should be studied without Mathematics, or the Philosophical Sciences without Literature, by which is of course meant the literature of the great nations of the ancient as well as those of the modern world.

Confining our attention henceforth to the Faculty of Law, the provisions of the Dutch statute are of the most comprehensive and liberal character. To most persons in this country they will appear too comprehensive, but this arises from a want of due appreciation of what the sphere of law and of legal education is, and from overlooking the fact that it is by no means intended that every branch of law in which instruction is provided should be studied by every student. In the Faculty of Law in each of the four Dutch universities there is taught, according to this statute, which has been fully acted on—(1) the Encyclopædia (or Introduction) to the Science of Law; (2) the Philosophy of Law; (3) the Roman Law and its history; (4) the ancient Dutch Law and its history; (5) the modern Civil and Commercial Law of Holland; (6) the Civil Procedure of the Dutch Courts; (7) the Criminal Law of Holland; (8) the Criminal Procedure of the Dutch Courts; (9) Public or Constitutional Law; (10) International Law; (11) Administrative

¹ This is allowed for in the Dutch system by subdividing the degrees in the various Faculties. Thus in that of Law there are two degrees—Doctor of Law and Doctor of Political Science; in the Faculty of Medicine three degrees—Doctor of Medicine, Doctor of Surgery, and Doctor of Obstetrics; in the Faculty of Mathematical and Physical Science six degrees—Doctor of Mathematics and Astronomy, Doctor of Mathematical and Physical Science, Doctor of Chemistry, Doctor of Geology and Mineralogy, Doctor of Botany and Zoology, Doctor of Pharmacy; and in the Faculty of Letters five degrees—in Classical Literature, in Semitic Literature, in Dutch Literature, in Oriental Languages, and in Philosophy.

Law; (12) Political Economy; (13) Statistics;¹ (14) Political History.

This does not imply that there are fourteen professors in the Faculty, for several professors teach more than one subject. In Leyden, for example, which still retains its pre-eminence as a Law school, there are only eight professors, although, in addition to the subjects above mentioned, the Law and Institutions of the Mahometan and other subject races of the Dutch colonies and the Public Law and Organization of the colonies are also taught.

Still less does it imply that all the students should attend the whole of these classes. In this there is complete freedom of selection. The division of the Law degree into two branches—one of Doctors in Law, and the other of Doctors in the Political Sciences—corresponds to a well-marked division of the subjects taught, which it will be observed are those necessary or useful for persons destined for a political career in the various branches of the public service as well as those required by professional lawyers.

The regulations with reference to the examinations for degrees in all the Faculties, including therefore the two degrees of Doctor of Law and Doctor of the Political Sciences, were left by the statute for future consideration, and they are contained in a Royal Decree of 27th April 1877.

By this decree there are two examinations for the degree of Doctor of Law. The first, which when passed gives the title of *Candidate*, is in the following subjects: (1) the Encyclopædia of Jurisprudence; (2) the History and Principles of the Roman Law; (3) Political Economy.

The second examination, which when passed gives the degree of *Doctor of Law*, is in (1) the Civil Law and Procedure of Holland; (2) the Commercial Law of Holland; (3) the Criminal Law and Procedure of Holland; (4) the Constitutional Law of Holland.

For the degree of *Doctor of the Political Sciences* the first examination is the same as that for the degree of Doctor of Law. The second examination is in (1) Constitutional Law; (2) International Law; (3) the Political Institutions of Holland and its Colonies; (4) the Principles of Civil, Commercial, and Criminal Law; (5) Political Economy; and (6) Statistics.

The examination for the degree of Doctor is divided into two parts, of which the first consists of written questions. After it has been successfully passed an essay is composed by the candidate in one of the subjects of the examination, and an oral and public examination takes place before the Faculty. No attendance at university lectures is compulsory for candidates who desire to

¹ It seems very doubtful whether (13) Statistics is a fit subject for oral instruction, but with this exception, and possibly also the subject of Legal Procedure (6 and 8), there does not appear in the above list to be anything which is out of place in a well-equipped Faculty of Law.

obtain degrees, but after a six years' course at a gymnasium or High School the student must pass an examination both oral and written, which entitles him to attend the university in a particular Faculty. There is also a similar examination provided for the case of those who have not been pupils of the gymnasia. All persons who have passed their examination can without university attendance present themselves for degrees, but as the examination for degrees is in the subjects taught in the universities the cases are rare in which the lectures are not attended. It is not necessary when lectures are attended that the candidate should present himself for his degree at the university where he has attended. Even after the examination for the degree of Doctor has been successfully passed, the Dutch student has still to undergo a further proof of his proficiency before he is promoted to his degree. It consists in the composition of a dissertation with at least twelve theses attached to it, which must be defended either in public or before the Faculty. This provision is a survival of the mediæval system, which has still left in Scotland traces of its existence in the Dissertations of the medical Faculties of the universities and in the Theses required from candidates for the profession of Advocate. The privileges which the degree of Doctor in the Faculty of Law confers are of much wider extent than those with which we are acquainted in this country, where university graduation is for the most part only an honour, or confers a certain social distinction but no substantial advantage.

It is provided by Article 9th of the Law of 28th April 1876 that the degree of Doctor of Law shall confer the right of being inscribed as an advocate, or of being nominated to judicial offices either in Holland or the colonies, and also the right of giving instruction in the schools or the political institutions of Holland.

The degree of Doctor of the Political Sciences confers the right of giving instruction in the gymnasia, political economy, statistics, and the political institutions of Holland (Article 83).

The statistics of the Dutch universities afford ample proof that their provisions as to legal education and graduation have been largely taken advantage of. The total number of students of Law in the three State universities of Leyden, Utrecht, and Gröningen was, in the session of 1858-9, 550, and in the Athenæum of Amsterdam 42, or 592 in all; it is now over 800. In 1876-7, the last year of which we have the precise figures, it was 813. The Law students in Leyden alone have during the same period increased from 265 to 574.

The total number of students in the five Faculties of the four universities was, in 1876-7, 2180; so that the Faculty of Law supplies considerably more than one-third of the whole number.

The graduation in Law has increased, but not with the same rapidity. The number of Doctors of Law in the three universities was, in 1857-8, 77, and in 1876-7 it was 98. But the relative number of degrees taken in the Faculty of Law as compared with

the other Faculties is still more marked, for the total graduation in 1876-7 was only 159; so that the Faculty of Law supplied more than one-half of the graduates. The explanation of the surprising paucity of medical graduates (only 16 in all, while in 1857-8 there were 85 medical graduates) is, that by a law of 1st June 1865 it is no longer necessary to take the degree of Doctor in order to practise as a physician or surgeon, but only to pass certain State examinations.¹ This is a fact which those of our medical reformers who desire to retain the connection of their profession with the universities would do well to mark.

When we compare the attendance generally at the Scottish universities with that in the universities of Holland, Scotland has no reason to be ashamed of the comparison. There were during the same session of 1876-7 4950 students at the four Scottish universities, while there were, as we have seen, only 2180 at the Dutch universities. But the case is reversed when we contrast the attendance in the Faculty of Law. While in Holland there were 813 students in that Faculty, in Scotland there were only 501; and while in Holland there were 98 graduates in Law, in Scotland there were only 6.

The chief cause of this difference is not obscure. It is not that the value of a university education is not appreciated, as is shown by the numerous attendance in the other Faculties. It is that in this country the Faculty of Law has not yet been recognised as the appropriate Faculty for persons destined for the service of the State, but has been confined almost exclusively to the training of professional lawyers.

Æ. M.

RECENT DECISIONS UNDER THE EDUCATION (SCOTLAND) ACTS, 1872 AND 1878.

DURING last year a series of articles on the position of the masters of public schools under the Education Act, 1872, appeared in the pages of this *Journal*, and it was one at any rate of the avowed purposes of those articles to collect together, in a readily intelligible and accessible form, the results arrived at in the five years during which the Court had been administering the Act. Since that series, however, was completed, other points under the older Act of 1872 have arisen, and a new Act, that of 1878, has been passed. Some of the decisions of the past year under these Acts we now propose to examine, without restricting our observations to the judgments relating to teachers and their interests, but taking up the whole questions raised.

On Saturday, October 19th, the Second Division pronounced judgment in the case of the *Perth School Board v. Magistrates and*

¹ Parvé's Report, p. 187.

Town Council of Perth (reported 16 Scot. Law Rep. p. 22). The point raised in that action related to the annual payment or contribution to be made by the Town Council to the School Board of the city. Prior to the passing of the Education Act—that is to say, prior to 1872—the Town Council had been in the habit of paying about £225 annually out of the funds of the city towards the maintenance of the teachers' salaries in what was then the burgh school, and they had also, in repairs, prizes, and so forth, spent about £100 a year more out of the same revenue. Now it was observed by the learned Judge, who had himself taken charge of the Education Act in the House of Commons, that the common good of a burgh consisted of its property, together with customs and market dues, but without assessments, and that education was one of the purposes for which this property was bestowed, and that “the Act of 1872 (which changed the management only) aimed at leaving the burden on the common good as it stood, and was in fact borne prior to the Act.” The section of the Act under which the question arose was the 46th, and the important part of that section is expressed in the following terms:—

“The Town Council of every burgh shall, at the term of Martinmas yearly, pay to the School Board thereof such sum as it has been the custom of such burgh prior to the passing of this Act to contribute to the burgh school out of the common good of the burgh, or from other funds under their charge, and the same shall be applied and administered by the said School Board for the purpose of promoting higher instruction; and it shall be lawful for the School Board from time to time, with the sanction of the Board of Education, to vary or depart from the said trusts with a view to increase the efficiency of the parish or burgh school by raising the standard of education therein or otherwise, provided always that nothing herein contained shall prejudice or interfere with the rights of any teacher or retired teacher of a parish or burgh school under any contract subsisting at the passing of the Act.” Reading this section, then, as it stands, the difficulty which arose at Perth may be stated in a few words. What was the meaning of the words “such sum as it has been the custom of such burgh to contribute?” Was this narrowed to cases only where a fixed sum had been usually paid? Did a “custom” mean one legally binding on all persons, one that had lasted the prescriptive period of forty years? This really was the main question, though we shall hereafter refer to some minor ones, and on this point the judgment pronounced has given no uncertain answer. “It seemed,” said Lord Gifford, “to be contended on behalf of the Lord Provost and Magistrates of Perth that to constitute a customary payment in the sense of the statute the sum paid must either have been paid as a matter of obligation against the Town Council on the one hand, and as a matter of right on the part of the burgh school on the other hand, or otherwise the pay-

ment must have subsisted without interruption from time immemorial, or at least for forty years. I do not so read the words of the statute. I think the custom referred to in the statute does not mean either obligation on the part of the Town Council, or right on the part of the burgh school. It is sufficient that a contribution in point of fact has been in use to be made, even although it should depend upon the mere good pleasure of the Town Council, and were dependent upon an annual grant or act of Council. Nor do I think that the custom pointed at by the Education Act is a custom which must have subsisted from time immemorial or for forty years. I think a much shorter duration than that of forty years will suffice to establish a custom in the sense of the Education Act." The precise time, his Lordship went on to say, was left indefinite by the statute, and must depend upon the circumstances of the particular case, subject to the exercise of a reasonable discretion by those interested in adjusting such questions. Lord Ormidale also expressed himself quite unable to construe the Act so as to say that the contributions must have been invariable in amount so as to bring them within the statute. Further, he adopted the period fixed by the Lord Ordinary as the basis of his calculations in this particular instance, and agreed that the average yearly payment during a period of ten years prior to 1872 was a suitable proposal.

Of the minor points raised we shall briefly notice but two. The first of these referred to the payments made for repairs, insurance, and so forth. It was contended on behalf of the Town Council that these were not sums "contributed to the burgh school" prior to the 1872 Act, and as such, in terms of that Act, falling to be "applied and administered for the purpose of promoting higher education." The Court, however, refused to draw any distinction between these payments and those made for salaries, because whether the payments were for salaries or for taxes, for retiring allowances or for repairs, they were all made for behoof of the school. These charges for repairs, for example, were no doubt much heavier in some years than in others: but that did not, it was expressly said, affect the principle; on the contrary, it only added force to the arguments in favour of taking an average of expenditure in a reasonable number of years. The remark of the Lord Justice-Clerk in a previous case (*School Board of Dunbar v. Magistrates and Town Council of Dunbar*, March 18, 1876, 3 R. 631, 13 Scot. Law Rep. 391) was referred to in this Perth case, that remark being that the object of the statute evidently was to leave the burghs of Scotland, in reference to their funds, neither better nor worse than they were before, the only change being administrative, and not in the amount formerly dedicated to the purposes of education. Lastly, the point was raised, whether the annual payments of the city of Perth to its School Board were to be fixed for ever in amount, or whether they were to fluctuate in the future as they had done in the past. Lord Ormidale said on this matter

that he entertained no doubt that there ought to be a precise sum fixed once and for all, and referred also to the words of the statute as indicating this intention in so far as they enact, that in place of the customary contributions a sum of money shall yearly be paid at the term of Martinmas.

Another judgment was pronounced under the Education Act of 1872, explanatory of the same section, and immediately after this Perth case, and that was in a special case for the *School Board of Dunfermline v. Magistrates and Town Council of Dunfermline*. This case presented certain somewhat remarkable peculiarities, principally arising from the fact that from 1835 to 1860 the affairs of the burgh were embarrassed and under trust, and that it is only since a comparatively recent date that the burgh funds or common good, chiefly by the development of the minerals, have become exceedingly prosperous. Prior to 1835 the annual payments made for behoof of the burgh school were—

Rector's dwelling-house, say	£25 0 0
Two sums of £8, 6s. 8d. for rector and music teacher	16 13 4
Additional annual payment	9 0 10
Maintenance and renewal of school buildings, say	30 0 0
Contribution towards usher's salary, including interest of 1000 merks, say	10 0 0
	<hr/>
	£90 14 2

After 1835, and during the insolvency of the town, these payments were interrupted more or less though the buildings were kept up. The rector himself accepted a composition in lieu of his allowances. When, however, in 1869, a vacancy in the rectorship occurred, the Council drew up a series of resolutions, of which the following four were the most important:—

“First, The separate house for the rector to be abolished, and the whole buildings, including the rector's house, to be made available for teaching and put into proper repair.

“Second, An annual grant of £100 to be given from the corporation funds, but ‘this grant, although intended to be a permanent endowment so long as the school continue to be conducted to the satisfaction of the Council, may be withdrawn at any time if that condition is not fulfilled.’

“Third, The rector also to receive £8, 6s. 8d. per annum, being the interest of Queen Anne's mortification.

“Fourth, The Town Council also to guarantee a certain minimum for the emoluments of the rector and English master for the first year after their appointment.”

This special case really turned upon the question whether these resolutions and the sums thereby granted were to be the sums paid annually to the School Board, or whether rather, in estimating the customary payments and the town's liability therefor, the older

practice which prevailed prior to 1835, and again from 1860 to 1869, must regulate. The difference between the two was considerable; for whereas, as we have seen, about £90 odd fell to be paid under the older *régime*, the payments under the resolutions of 1869 amounted annually to over £138. Lord Gifford, with whom the other Judges concurred, was clear that the Board were entitled to receive the larger sum, and he made the following observations as to the customary obligation:—

“Now, although the resolutions of 1869 seem to commit the town to a considerably larger annual sum than was paid prior to the town's embarrassment in 1835, still, keeping in view the whole circumstances, the suspension of the town's management from 1835 to 1860, and the present condition of the town's affairs, I do not think that the resolutions of 1869 were an unreasonable reading of the town's customary obligation in reference to the burgh schools, and I think that the Town Council themselves then fairly measured and fixed what the customary obligation was. They dealt liberally with the burgh school, but they were quite entitled if not really bound to do so.”

We now come finally to a most interesting and important case raised in the Registration Appeal Court last month, a case moreover of great practical importance to schoolmasters as a body. We refer to the right of franchise involved in the decision pronounced in *Murray v. Morton* (16 Scot. Law Rep.) and other similar cases. These questions arose, curiously enough, under the new Education Act of 1878 (41 and 42 Vict. c. 78), and under section 24 of that Act, which was manifestly intended to remove all questions and difficulties, owing to the defeasible character of the schoolmaster's tenure. In the series of articles already referred to, which appeared last year in this *Journal*, this difficulty as to franchise was noticed, and a strong expression was given to the hope that legislation would remove the obstacle and restore to a body of educated and intelligent men the electoral rights of which they had been deprived by what really was a technicality and little else. Accordingly it was with general satisfaction that the public learned the intention of the Government to insert a new clause in the Act of 1878 for the purpose of clearing away the difficulties raised by the decision of the Registration Appeal Court of 1877. The clause, however, as may have been seen from certain peeps behind the scenes of late, underwent considerable changes in its passage through the Legislature, and these changes evidently produced considerable confusion. When we think how those who placed amendments on the paper proceeded, after the Act had been passed and its obscurities had been revealed, to criticise and sit in judgment without even taking the trouble to refer to the actual terms of the clause under discussion; when again we think how the Act as a Government measure necessarily passed in its last stage through the hands of the chief law officer of the Crown with all its amendments upon it, can we be blamed for

wondering at the marvellous result? But let us take the section itself and closely follow its terms, so as to fairly appreciate the questions raised in the Registration Appeal Court. The words of the Act are as follows:—

“Whereas doubts have arisen as to the right of a teacher of a public school under a school board, who holds office at the pleasure of the board, and who occupies as part of the emoluments of his office, lands and heritages under the School Board, to be registered as a voter and to vote at elections for a member or members to serve in Parliament, in respect of the qualification afforded by such lands and heritages: And whereas it is expedient that such doubts should be removed, be it enacted, that from and after the passing of this Act it shall be no objection to the name of any such teacher being placed on the register of voters for the burgh or county within which such lands and heritages are situate, that the lands and heritages occupied by him, and on which his claim to the franchise rests, are held as part of the emoluments of his office, and at the pleasure of the School Board: Provided that the rental of such lands and heritages, according to the valuation roll, shall be of sufficient annual value to qualify a voter.”

Now the general question raised by this 24th section in the Registration Appeal Court was simply whether schoolmasters of public schools holding their offices as described in the section were to be enrolled on the register of voters for counties as tenants of their dwelling-houses and gardens under a qualification requiring £14 of annual value, or as proprietors under the £5 qualification provided by the Act of 1868. One of the cases, it may be incidentally mentioned, presented the peculiarity of a claim to be enrolled as “proprietor *pro tempore*,” but in most of the appeals the question simply lay between enrolment as owner or as tenant. The particular case we are referring to (*Murray v. Morton*) was one of an old teacher, that is to say, a teacher who had received his appointment before the Education Act of 1872 had been passed. It was pointed out that under the old Act of 1803 (43 Geo. III. c. 54) there was allodial tenure, and the schoolmaster's position was an example of a *munus publicum*, whereas under the 1872 Act the whole question was one of contract, and the very house on which the claim was founded might be sold at any time. In the older times the heritors were bound to provide a house; no such obligation now lies upon the School Board, who may make their own bargain as seems best in their own eyes. It was however urged on behalf of the claim to be enrolled as proprietors that the 1878 Act had been manifestly passed to remedy a grievance unintentionally created by the 1872 Act, and that the general object was to remove all objections. The one side pressed the fact that the new Act had been passed in consequence of the rejection of a claim by a schoolmaster to be enrolled not as a proprietor but as a tenant, while the other side argued that the remedy was a general one,

"rental" in the valuation roll, for example, covering both cases, and both the words "occupier" and "rental" occurring in the 24th section of the 1878 Act. Lord Ormidale, who differed from the other Judges, said that in the case stated he was not able to find from the beginning to the end any indication of proprietorship. The teacher gets his "lands and heritages" as schoolmaster and occupies them as such. "It would be very odd," it was added, "were he to get this as *property* even for life when he may be discharged from his office at any moment." It was also observed that the claim was to be registered as "liferent proprietor," and that reference was intended to the old Reform Act 1832, where the liferenter and not the *fiar* has the franchise conferred upon him. "It is surely possible," his Lordship adds, "that the schoolmaster is neither liferenter nor *fiar*, but merely tenant." In this view also observations were made to the effect that the School Board had not even the power to grant to their teacher a disposition to his house, and that "*sub-tenant*" would often most accurately describe his true position. The doubt, the only doubt and difficulty that the Act of 1878, according to Lord Ormidale, was passed to remove, was the doubt and difficulty as to the defeasible character of the schoolmasters' tenure, and the new Act goes only so far in this light as to say that the fact of their only rent being their official services was to be no bar to their enrolment.

These views, however, did not prevail with the majority of the Court. Lord Mure pointed out how prior to 1872 the schoolmasters were "liferent proprietors," and were so enrolled, holding as they did *ad vitam aut culpam*. The change between 1872 and 1878 disfranchised them, and now under the new Act his Lordship seems to regard the period since 1872 as it were like an interregnum to which the Act of 1878 put an end, restoring the old 1832 position of affairs. We have, however, one observation to add upon this matter, namely, that whereas prior to 1872 there was the old *ad vitam aut culpam* tenure, that was abolished by the 1872 Act, and has not been in any way restored by that of 1878. Accordingly in this view the tenure is the tenure of 1872, but the franchise is the franchise of 1832. It is not necessary here to dwell further upon the opinions pronounced, for we cannot but feel that a practical result has been obtained of great value, even though we may think the terms of the Act have been strained to reach it. If any recognition is to be given to intelligence and education in our national system of representation (and the existence of university members show that such a recognition is accorded by the State), there is no body of men better entitled to the franchise, and we may be allowed to express a hope that they will use it intelligently, and not for the mere purposes of combination in the attempt to realize mere quixotic dreams—such, for example, as a return to the old fixity of tenure.

THE LICENSING COURTS.

PRACTICE in the Licensing Courts is neither popular nor attractive. At the same time, we question whether the proceedings of any other Courts in the country receive an equal amount of popular attention. The newspapers record their decisions at great length, and the public flock in numbers to watch the manner in which they administer justice. The reason is very obvious. The questions at issue are easily understood, and the arguments are conducted in language which is generally intelligible.

At present the licensing laws are in a state of transition. Grocers' licences, publicans' licences, and the whole system of the sale of intoxicants, have within the last few years received an amount of attention which has raised the licensing question into one of the most prominent questions of the day. Not many years ago people acquiesced in a state of things which had existed for a very long time. A certain number of public-houses were considered necessary in a district. Licensed grocers were regarded as a class of merchants who pursued a useful branch of commerce with profit to themselves and convenience to the public. Few questioned the authority which granted the licences. In a word, society was indifferent to the whole subject. All that is changed. Social economists, politicians, and lawyers have taken up the matter, and a fierce controversy is being carried on, which finds one of its principal battle-grounds in the Licensing Courts.

In 1876 the Legislature was appealed to, and an Act was passed, the object of which was to assimilate the law of Scotland relating to the granting of licences to the law of England. By this Act (39 & 40 Vict. c. 26) no grant of a new certificate in any county in Scotland (except the county of Edinburgh) is valid unless it is confirmed by a Standing Committee of the Justices of the Peace for that county. These committees are chosen in the following way, under provisions contained in section 7 of the Act of 1876, as amended by 40 Vict. c. 3 (the Publicans Certificate Act (1876) Amendment Act, 1877). The Justices of the Peace in quarter sessions appoint from among themselves a County Licensing Committee, or, if they think it necessary, several such committees, with various areas of jurisdiction. These committees consist of not less than three, and not more than twelve members. Three members form a quorum. In the event of a vacancy from death, resignation, or any other cause, the Justices in quarter sessions may appoint a successor. These committees are, it is provided in the Act, to be called "County Licensing Committees."

In burghs the grant of a new certificate must also be confirmed by a committee exercising similar powers to those vested in the County Committees. The composition of the Burgh Committees is, however, somewhat different. It consists of Magistrates of the

burgh and Justices of the Peace of the county in which the premises in respect of which the certificate is applied for are situated. The statutory name of such a committee is "The Joint Committee for the Burgh."¹ The Joint Committee consists, as a rule, of three Justices of the Peace of the county in which the burgh is situated, and three Magistrates of the burgh. In cases, however, where by the constitution of the burgh there are only two Magistrates, the Joint Committee consists of only two Justices of the Peace in addition to the Magistrates. The Magistrates who are to sit as a Joint Committee are appointed by their fellow-magistrates; and the Justices of the Peace who are to sit along with them are appointed by the County Licensing Committee of the county within which the burgh is situated. Such, as our readers are doubtless well aware, is, briefly stated, the constitution of the Supreme Court in licensing questions. We are inclined to doubt whether some amendment of the law is not clearly necessary. The system of County and Burgh Committees, looked at from a purely theoretic point of view, is unsatisfactory in many respects. One objection will at once suggest itself, namely, the mode in which the members of these committees are chosen. The County Committees are chosen by the Justices at quarter sessions, and the Burgh Committees are nominated, half by the County Licensing Committees, and half by the Magistrates in Council. It is perfectly evident that the opinions of the committees will depend on the opinions respectively of the Justices and Town Council, or rather on the opinions held by the majority in each of these bodies. That fact at once opens the door to discussions and divisions, the tendency of which is to send men to act as members of committee who are virtually pledged to support a certain line of action with regard to all applications for licence rather than to judge of each application on its merits. In practice this is said to be the case, and we fear that in some districts the members of committee are regarded by the public as incapable of forming an unbiassed opinion on any case which is brought before them. In Edinburgh it so happens that the Joint Committee has refused to confirm, in two successive years, certain new certificates which the inferior Licensing Court had granted. The result has been, as we have reason to know, a considerable amount of ill-feeling among some classes of the community. The plain English of this is that the Joint Committee, a Court duly constituted by law for judging in certain cases, has fallen into disrepute. It is said not to judge of the cases brought before it on their own merits. It is supposed to be prejudiced against applicants for certificates, and, so far as the majority of its members are concerned, to come into Court with a bias in favour of one side and against the other. This is a most undesirable state of matters, but we fear that it is inseparable from the system introduced by the Act of 1876. We think that if the members of this

¹ Not "*Confirming Committee*," as it is frequently called.

important Court are to be chosen by election, they should be chosen by the votes of a wider constituency than the Justices of the Peace and the Town Council. Why should the rate-payers of each district not have a direct voice in the matter? We are convinced that the solution of the question will ultimately be placed in their hands. The present system is at best a temporary make-shift. It is based on no definite principle. In practice, it has given much dissatisfaction. Certificates should not be granted or refused for the convenience of individuals. The inhabitants of each district are best able to judge whether new certificates are wanted or not, and they should, therefore, have the privilege of choosing those who will carry their wishes into effect. Such a system would be based on a definite principle, the principle of popular representation. It may be said that the Courts, as at present constituted, are open to popular influences. We acknowledge that it is so, but that influence is evinced in a manner which is most derogatory to the dignity of the Courts. The way in which influence is brought to bear on the Licensing Courts is something very like a scandal. What would be thought if the Judges of the Court of Session gave private audience to suitors, listened to *ex parte* statements in the robing-room, and gave assurances which led litigants to form tolerably correct opinions as to their chances of success! Yet this is done by the Judges of the Licensing Courts. Before the meeting of these Courts their members are waited upon by deputations, who urge their particular views, and try to influence the judgment which is to be delivered. To receive such deputations is inconsistent with the judicial character, and necessarily diminishes the value of any decision arrived at by Judges who have done so. We lay particular stress on the fact that the Licensing Courts have judicial functions to perform, because, year by year, the opposition to granting new certificates is on the increase, and the difficulty of deciding questions of licensing is vastly greater than it was when there were fewer disputes about them. Having such functions to perform, nothing should be done by them behind the scenes. All the public wish is perfect fairness. The trade in intoxicants is allowed by law, but it is violently opposed. The result is that at every meeting of a Licensing Court there are two sides. The arguments, petitions, and facts brought forward in support of these two sides should be heard in open Court and there alone. To hear either side in private is an injustice, and of such injustice we regret to think the Judges of our Licensing Courts have been guilty.

But in the way of licensing law reform there stands a barrier which has hitherto been insuperable. This barrier is the Permissive Bill. Nothing more obstinate, nothing more perverse, nothing more infatuated than the attitude of its supporters has ever been seen in the history of English politics. They appear to have lost sight of their object in their admiration of the means they have

adopted to attain it. The proposal to try any other method for the removal of the evils of the liquor traffic is heard with impatience. Year after year does Sir Wilfrid Lawson introduce, in strains of unbecoming levity, his pet measure. Year by year does the House of Commons reject it. Yet throughout the country the minority who are in favour of it persistently refuse to accept the teachings of fact, and rush in the face of evidence which should long ago have convinced them that their cause is hopeless. They insist on having their own Bill, the whole of their own Bill, and nothing but their own Bill. To listen to their intemperate temperance speeches is to listen to the utterances of men who seem utterly incapable of seeing that there are two sides to every question. It is a very serious misfortune for the country that so many active men should be misapplying energies which, if directed into a more practical course, might speedily accomplish a very substantial amount of reform. That reform is urgently needed is patent to every candid mind, but it is also clear that Sir Wilfrid Lawson's Bill is not such a measure as will be accepted by the House of Commons. In the meantime the state of our Licensing Courts in Scotland is most unsatisfactory, and until some better system is introduced we fear that no reform is possible in a trade which, undoubtedly, is productive of many evils.

LIQUIDATORS AND SHAREHOLDERS IN COURT.

WITH the prospect of much litigation arising out of the recent bank failure it may not be amiss to recall the principal points which calamities of a similar nature have within recent years in the law of Scotland settled. Already numerous attempts are being made by alarmed shareholders to get rid of their dread responsibility, so uncertain in its extent; and it is even rumoured that the important question of the liability of trustees, upon which the Court of Session and the House of Lords have already differed, is again to be raised and argued afresh.

The actions originating out of the collapse of great trading companies are usually either, on the one hand, at the instance of the shareholders seeking, it may be, damages or restitution of what they have themselves contributed, and basing their demands on allegations of fraud, or on the other, they are brought by the liquidators as representing the company against either defaulting directors or individual shareholders who may be disputing their liability for calls.

The first case to which we shall refer is that of *Leslie's Representatives v. Lumden and others* (Dec. 17, 1851, 14 D. 213), which arose out of the collapse of the Banking Company of Aberdeen. It was

brought by the representatives of the late Mr. Leslie of Powis, and was directed against five of the twelve directors who had managed the company, and to whose acts of alleged fraud, along with those of their co-directors, the pursuers attributed loss. This case established two important points, viz. (1) That a single shareholder may pursue an action of this sort without either the concurrence of the rest, or without making them or the company parties to his action. (2) That a shareholder may single out one or more directors as defenders, although the alleged fraud upon which his action is based may, as a charge, involve the whole of the body. The defenders argued that if they had as directors caused a loss to the company, a claim against them formed an asset of that company, and could only be disposed of with the company in the field. This argument the Judge had no difficulty in rejecting as unsound, mainly upon the equitable consideration of the hardship which might ensue if an individual shareholder could not seek redress without the concurrence of others. Lord Cockburn remarked: "As to the first point, that of want of title, I do not see how it can be seriously stated. The pursuers say that they have been wronged by certain persons, but they are told that they have no title or interest to sue for reparation unless all who have suffered join in the action. I do not understand this. I think those who have been injured have a right to protect themselves." And Lord Medwyn: "It is for those who think themselves injured to take their own measures; and they cannot be kept from their remedy because other shareholders do not concur in the action." The pursuers averred special acts of fraud against the particular directors singled out; but it would rather appear, especially from the opinion of Lord Cockburn, that even where the acts affected the whole body, it is, nevertheless, unnecessary to sue every member of it. One of the defenders, who had ceased to be a director for some years previous to the date of this action, sought to have his liability limited, but the Court declined to do this at a preliminary stage of the case.

The pursuers having thus been successful at the outset, and established these important points in their favour, insisted further in their action. But now they were unsuccessful. The Court refused to hold their previous judgment as excluding an inquiry into the relevancy of the averments of fraud, and taking up that inquiry, they, with the exception of one Judge (Lord Justice-Clerk Hope), threw out these averments as irrelevant. Some of them were held to be so in themselves, others because insufficiently stated as against the defenders. The case was to a certain extent special, from the fact that the bank had been carried on under a series of contracts of copartnery, rendering it somewhat more difficult to bring home the charges to the particular directors singled out. But in the judgments there is much which applies to the whole class of such cases. Lord Handyside, the Ordinary, goes

over in detail the general averments of improper conduct and concealment which are likely to be made in actions of the sort, as, for example, advances of undue amount undisclosed to the shareholders, and representations of the prosperous condition of the bank in spite of large unsecured debt due to it, and large dividends paid not warranted by the condition of the bank's affairs. According to his Lordship, there must be an implied discretion allowed to directors in making advances on the mere personal credit of traders; and although in this case the amount advanced was admitted to be "most startling," and he felt it to be "difficult to resist the conclusion that the directors acted from motives, whatever might be the precise character of them, giving colour to the imputation of fraud," yet he was not prepared to recognise amount as inferring fraud. So long as debts are considered good the annual profits are to be held legitimate, and even under heavy losses "the continuance of a high rate of dividend, however improvident, cannot be brought up to an act of fraud committed by the directors." Then as regards failure on the part of the directors to disclose how matters stood, he says: "It is apprehended that the confidentiality required in bank transactions will afford a sufficient answer to the non-publication to a body of shareholders of the accommodation which has been afforded to traders in whose solvency the directors must be assumed to have confidence, but whose credit might be damaged by declaring at a public meeting the state of their bank accounts." There were other and more special averments of making false entries in the books of the bank, and also of misrepresentations; but they were also rejected, because, to quote the words of the Lord President, there were "throughout the record a failure to specify the particulars of the falsifications of books and of the misrepresentations alleged in general terms. Also a failure to specify as to the several defenders the participation which they had in the alleged falsifications and misrepresentations."

The minority, as has been stated, consisted of the Lord Justice-Clerk, who would seem from his opinion to have looked upon even the more general averments as relevant to infer fraud, although he also seems to have thought that the action might be relevant independently of a fraudulent motive being sufficiently set forth: "It has been held, much too hastily I think, that fraud is essentially necessary to this action."

The pursuers seem to have failed through pleading their case too high, for one is entitled to damages for the loss incurred by careless and reckless as well as fraudulent conduct.

Not long after another action was raised by the representatives of another shareholder (*Tulloch v. Davidson*, June 3 and July 16, 1858, 20 D. 1045 and 1321). Here the pursuers singled out one of the directors, or rather his representatives, and in doing so acted wisely. As the Lord Ordinary (again Lord Handyside) remarked, the action was "unembarrassed by the difficulties which were held

insurmountable in the former case, through calling as defenders various directors, each of them differed from the others as to periods of service as directors, without otherwise sufficiently connecting them together, and only one of them being a director throughout the contract, while the whole of the defenders were concluded against conjunctly and severally," and he had no doubt that under this record a relevant case had been made out. And yet the averments were very similar to those which Lord Handyside had previously rejected as not amounting to fraud, although, if true, indicating carelessness on the part of the directors and awakening suspicion as to their integrity. His judgment was adhered to by the Inner House. The Court held the former action quite to settle the question of the right of a single shareholder to sue a single director. Issues were accordingly adjusted by which the jury were asked to determine whether this particular director along with his co-directors had fraudulently and in violation of their duties misrepresented and concealed the true state of the bank's affairs, thus preventing the pursuer either from bringing about a dissolution of the company, or otherwise preventing or alleviating the depreciation of the value of the stock of said company. This case may be held as indicating that it is immaterial from whom the shares have been purchased, if fraud of the directors has led to the purchase being made.

An appeal was taken to the House of Lords, where, however, the judgment of the Court below was affirmed (see 22 D. H. of L. 7). The Supreme Court suggested a principle for the assessing of damages in such cases, viz. the measure of the damage was in their opinion the difference between the price paid for the shares and what would in the actual circumstances of the company have been a fair price.

These cases were held in the subsequent great action of the liquidation of the *Western Bank v. Douglas and others* (January and March 1860, 22 D. 447) conclusive upon the question of the necessity for calling all concerned, and that even when the action was not in terms at least founded upon fraud, the Lord Justice-Clerk (Inglis) said, "It is a mistake altogether to suppose that no *delict* or *quasi delict* can be made the foundation of such an action as the present without the use of the term 'fraud' or the epithet 'fraudulent.' There are many *delicts* to which such language could not with any propriety be applied;" and he gives as an example, "where, as in one of the alternatives of the present summons (in which the weakness of the pursuer's case in this discussion is supposed to lie), the ground of liability is to be found in systematic and wilful neglect of a duty undertaken, on the performance of which by the defenders others have naturally and justifiably relied, which the law designates as *crassa negligentia*, and holds equivalent to dole or fraud." This was an action at the instance of the liquidators as representing the company, and en-

gaged in settling its affairs, against certain gentlemen who had been its directors and managers, and seeking for losses and damages alleged to have been incurred in consequence of the mismanagement of these defenders. In the previous cases the directors had attempted to shield themselves against the attacks of individual shareholders by pleading that such pursuers did not represent the company and could not sue alone. Here they took up exactly the opposite plea, and objected to the liquidators doing what they maintained could only competently be done by individual shareholders.

But this did not avail them. "The defender," says the Lord Justice-Clerk, "urges with much earnestness that the claim in this summons is not a company claim, and consequently that neither the incorporated company nor the liquidators have any title to sue for its recovery; and the plea is rested on what appears to be a total misunderstanding of the judgment of the Court and of the House of Lords in the recent case of *Tulloch v. Davidson*, where under certain circumstances an individual shareholder of a joint-stock banking company was found entitled to sue directors accused of fraudulent malversation of office, for the loss thence arising to his own personal estate as an owner of shares in the company. The defenders find it necessary to their plea to maintain that an action by each shareholder for his own personal loss is the only form in which such liability can be established." And he goes on to point out that if this reasoning were sound, to enable the shareholders to recover what was right in this action it would be necessary to bring into Court 19,500 summonses, expressing the hope that the parties who stated such pleas were prepared "to approach the Legislature with urgent petitions for a very large extension of the judicial establishment in Scotland." But it appeared to the Court "that when damage has been sustained by the company through acts of the directors for the consequences of which they are legally responsible, the company is primarily at least the party to sue the directors for reparation, to the effect of resting the company's estate against the loss it has sustained, whatever may be the nature otherwise of the acts of the directors inferring such liability." Subsequently a compromise was entered into between the pursuers and the defenders, with the exception of two. It was held that the discharge of the other directors alleged to have been jointly delinquent did not prevent the pursuer insisting in the action against the remaining defenders. On the other hand, however, it was held that the hypothetical allegations, "that if the directors had not themselves been guilty of abuse of power and fraud in the management of their business, then they had failed and neglected to perform the duties of management, and had delegated and devolved these duties upon the manager, while by holding office they professed to be discharging these duties themselves," was relevant as an averment of gross negligence against

the body of the directors for the time, but not of neglect of duty on the part of individual members. The difficulty of establishing a case against these individuals under the action as framed led apparently to its abandonment in spite of an allowance of issues by the Court (see the report of this case under date March 20, 1862, 24 D. 859).

The case of *Graham v. the Western Bank* (Feb. 2, 1864, 2 Macp. 559) resembles those of Leslie's representatives and Tulloch, but has peculiarities. The pursuer had in this case purchased direct from the bank a number of years previous to his action, and he sought *restitutio in integrum* from the liquidators as representing the bank, with an alternative conclusion for damages. The defenders mainly relied upon this argument, that *restitutio in integrum* must not be one-sided, that both parties should be restored to their original position, but that the pursuer was not in a position to restore to the defenders what he had purchased from them. While he had been a shareholder losses had been incurred which rendered it impossible to give back the stock of the value which it possessed at the time of sale, and these losses had been incurred through the act of directors who were his own managers. Although the Lord Ordinary (Kinloch) in reporting the case seems to have taken a view favourable to the pursuer, being of opinion that the element of fraud might modify the principle contended for by the defenders, and although the pursuer succeeded in obtaining an issue and a verdict in his favour, the contention of the defenders was ultimately given effect to when the verdict was set aside. The arguments in this case were twice carefully considered by the Court, printed cases having been ordered. The pursuer from the first got hints to content himself with his conclusion for damages. The jury trial was allowed before answer as it were, and the issue for the pursuer was to this effect, "Whether he was induced to make the said purchase by false and fraudulent representations made by the said bank as to the state of its affairs, and whether the defenders are resting-owing," etc. He was not allowed an issue to try the alternative conclusion for damages. The defenders were allowed to try by a counter-issue the question whether or not the pursuer had barred himself from repudiating the purchase. The second report of this case is under date March 8, 1865, 3 Macp. 617. Lord Deas in the case of *Addie* states shortly the principle of his decision in that of *Graham*. "The main ground," he says, "upon which my own opinion rested in the case of Mr. Graham, that the verdict ought to be set aside as contrary to law and evidence, was that Mr. Graham during the years subsequent to his purchase had been a party to precisely the same sort of thing, attended with the same sort of consequences, and these consequences to a very large and serious amount—the same sort of fraud upon which alone his action was rested against the shareholders of this dissolved bank" (3 Macp. 911). *Addie's* case (March 4, 1864, 2

Macp. 809, and June 9, 1865, 3 Macp. 899) was very similar to that of Graham, the remedies sought being the same, and also the result, a verdict in the pursuer's favour being set aside by the Court. In charging the jury the Lord President laid down that while it was a part of the duty of the directors to submit to the shareholders a report of the affairs of the bank, their report implies nothing more than that they have a reasonable ground to believe in the truth of what they assert, and that it is not incumbent upon them to go personally through the books and test their accuracy, they being entitled to rely on the information supplied by the officials; but that if directors take upon themselves to put forth false statements, or such as they have no reasonable ground to believe are true, this would amount in law to a fraud practised upon those who purchased upon the faith of such statements communicated officially with the view to induce them to purchase. This part of the charge was excepted to on the part of the defenders, but the exception was disallowed. This case went to the House of Lords. There was rather a difference of opinion in the House of Lords between Lord Chelmsford and Lord Cranworth touching this direction of the Lord President's. The former approved of it. He could see no objection to the jury being called upon to determine the reasonableness of the directors' belief in the truth of their statements: "Supposing a person makes an untrue statement, which he asserts to be the result of a *bona fide* belief of its truth, how can the *bona fides* be tested except by considering the grounds of such belief?" Lord Cranworth seemed to dread either judge or jury being called upon to decide upon the reasonable and *bona fide* nature of the directors' belief. Lord Chelmsford, however, endorses an opinion of his noble and learned brother delivered in a previous case, and in which an important distinction affecting this class of cases is laid down. That distinction briefly stated is this. If a person who had been deceived by the fraudulent representation of directors institutes an action for the purpose of having the contract into which he has entered rescinded, he is entitled to impute the misrepresentation to the company, and bring an action against it; but if he sues for damages for the deceit, he must go against the directors personally.

It is somewhat remarkable that after the deliberation with which the Court of Session entertained these important cases of Graham and Addie they should have in each allowed issues and a trial. The question appears, from the arguments which took place before issues were allowed, to be clearly one of relevancy; accordingly, in both cases the verdicts were, as we have seen, set aside, and a new trial would in all probability have led to the same result. The House of Lords, when Addie's case came before it, had no difficulty in deciding that the pursuer was not entitled, in the first place, to an issue of restitution, because he could not on his part effect restitution; and in the second place, that he could not have

an issue of damages, seeing that the company and not the fraudulent directors were the defenders (May 20, 1867, 5 Macp. H. of L. 80).

A decision pronounced in the case of the *Western Bank v. Baird's Trustees* (Nov. 22, 1872, 11 Macp. 96) serves, we think, to show the difficulties which lie in the way of succeeding in an action of damages against single directors. The liability was in that case narrowed down to the alleged loss by advances on accounts current, which were closed at the time when the defender ceased to be a director.

These decisions seem to establish, then, the following principles: That a director guilty of fraudulent or negligent conduct is liable in actions both at the instance of the company as represented by its liquidators and at that of the individual shareholder. One shareholder may pursue, and one director may be compelled to defend, but he will not be liable for the fraud of his brother directors in which he could not be presumed to have participated. Further, that the company is not liable for the fraud of the directors, and therefore no action for damages can lie against it as distinct from them; while, on the other hand, as the company may not benefit by fraud, it cannot insist upon the maintenance of a contract which has been brought about by the deceit and misrepresentations of its directors, and must allow such a contract to be rescinded. That restitution by the company can only be demanded when the shareholder is also in a position to restore to the company what he obtained from it.

The experience of past litigation certainly affords but little encouragement to the unfortunate shareholders of the late City of Glasgow Bank. Doubtless many might have good grounds of action against the individual directors, but as it is more than probable that the private fortunes of these gentlemen are now lost to them, such actions might prove labour in vain. *Restitutio in integrum* again is surely impossible. Some, however, may succeed in getting their contracts of copartnership rescinded, and thus escape further liability although unable to recover what has been already lost.

Perhaps no decision ever given by the Courts of this country will affect the fortunes of so large a class as that pronounced in the case of *Lumsden v. Buchanan and others*. It is singular that in spite of such a decision so many trustees should have continued and so many more have become shareholders in unlimited companies. It is the best proof of the thorough confidence which Scotchmen have hitherto had in the stability of their banking system. That one should incur the risk of ruin while speculating for himself is easily understood, but that one should voluntarily accept such risk in the exercise of a gratuitous office is strange indeed. And yet we can safely prophesy that trustees will continue to invest in bank stock. The case of *Lumsden v. Buchanan* (Feb. 24, 1864, 2 Macp. 695)

seems to raise the question of the liability of trustees under all the circumstances favourable for the defenders. In the first place, Buchanan and his co-trustees had ample power to invest their trust funds in banks. By their trust-deed it was declared that they should not be liable for any banker into whose hands any of the trust funds might come to be deposited. In the second place, they had signed the contract of copartnery of the Western Bank *in their capacity of trustees*. Again, there were no trust funds left, all having been swallowed up by the failure. Last of all, they were called upon by the liquidator not to satisfy the creditors of the bank (who had by this time all been paid), but to assist in equalizing the loss amongst the other shareholders. It is to be feared that in the case of the present calamity trustees will be called upon to meet the claims of the general public. Now, that there is a distinction between a question *inter socios*, as that raised in Buchanan's case undoubtedly was, and one between partners and their creditors must be clear to every student of law, and is most distinctly brought out by the Judges in the decision of this very case. The minority in the Court of Session, who held that these trustees were personally liable, was formidably led by such a Judge as Lord President Inglis. Had the question raised been the liability of Buchanan and others to deposition, there can be little doubt that the minority would have been rendered more formidable. Thus Lord Kinloch, who first decided the case as Lord Ordinary, and afterwards delivered an opinion as a member of the Court in favour of the defenders, says: "I cannot hold it necessary towards deciding that the trustees are only liable to their copartners to the value of the trust estate, to determine, in the first place, that they are no further liable to the creditors of the company. The question with creditors is wholly different from the question *inter socios*, and is one on which I would be understood as giving no opinion, one way or other. The distinction between the two cases is simply this, that amongst partners all is matter of contract, their whole rights and obligations are ruled by the contract of copartnery; but in regard to creditors the contract of copartnery has no such unlimited operation." And Lord Benholme: "I think that the question at issue is one between the several members or partners of a company, and not between that company or its partners and the creditors of the company or the public; and I consider any process of reasoning which commences on the footing that the one of these questions is identical with or even similar to the other is calculated to lead to a wrong result." The Lord President remarked, "Although they (the defenders) might be liable for debts of the company in a question with the creditors of the company, it does not follow that they would be liable in a question *inter socios*. This proposition is too plain to require argument or illustration." Lastly, Lord Curriehill says: "In many cases, persons who may be dealt with as being under the liabilities of partners of a company in a question with its creditors, may, notwithstanding, not be truly partners; and such persons, instead

of being liable in relief to the actual partners, may be entitled to demand relief from them." It is clear, therefore, that even the majority of our Judges, in deciding this case in favour of these trustees, did so distinctly on the understanding that the question which it raised was one *inter socios*, and avoided committing themselves to any opinion upon the very different question which might arise between such defenders and the general public. In the House of Lords the Lord Chancellor said, "It seems to have been considered by the majority of the Judges in the Court below that the trustees were certainly liable to the creditors."

In the Supreme Court the trustees had to contend against the fact that by the English law of trusts their liability was beyond all dispute, while the divided state of the Court below pointed to the question under Scottish law being a doubtful one. The majority of the Judges, looking to the terms of the contract of copartnership of the Western Bank which these defenders had entered into, had no difficulty in holding that they had rendered themselves liable personally, although they admitted that, to use the words of the Lord Chancellor, "a trustee may, both in England and Scotland, so limit and restrict any contract he may enter into as to exclude (as between himself and the other parties to such contract) personal liability." But then "this must be the result of express stipulation, and whether this be or be not the effect of any particular contract is a question depending upon the construction of the instrument and the nature of the contract." According to the majority of the Scottish Judges, a trustee limits and restricts the contract by the mere fact of entering into it *as a trustee*, setting forth his character. The House of Lords held that this was not sufficient. The only approach to comfort which persons in the position of the defenders can derive from their decision is to be found in the remarks of Lord Kingsdown, who could not divest himself of the impression that "neither did these persons" (the defenders) "contemplate pledging their individual responsibility, nor did those who became partners with them contemplate such liability, or look for contributions to anything but the trust estate." Further, he was of opinion that if the defenders were not liable *inter socios*, they would not be liable to the creditors of the company. Nevertheless, Lord Kingsdown did not venture to constitute himself a minority. The House of Lords' report of this case will be found in 3 Macp. H. of L. Cases, 89.

In the subsequent case of *Lumsden v. Peddie* (Nov. 16, 1866, 5 Macp. 34) an attempt was made to distinguish between the case of a trustee and that of a *curator bonis*. The defender had accepted a transfer of shares in the Western Bank, and his name appeared in the register, where he was designed as "*curator bonis* for Mrs. Jane Broomfield, Edinburgh." He contended that this designation was a sufficient limitation of his liability, and further, that as a *curator bonis* (unlike a trustee) is not vested with the property of

his ward, the ward remained the true proprietor. The Court went now the length of saying that even if the officers of the bank were under the impression that the ward and not the curator was the true partner, "they were altogether wrong, and their mistake cannot alter the legal position of the defender in relation to the other partners of the company, and to the liquidator as representing them." They also held it to be "now well settled that in this, or any the like company, no one can become a partner with a limited liability, or with any other liabilities than such as are borne in common by all the partners."

It remains only to notice, in conclusion, the case of *Urie v. Lumsden* (Nov. 25, 1859, 22 D. 38), in which it was held that an illiquid claim of damage is not a ground of suspension of a charge on a decree obtained by statutory liquidators. That was under the former Joint-Stock Companies Act, but applies equally well under the present statutes. It will be thus seen that the result of the decisions upon the whole is clearly favourable to the interests of the creditors of insolvent companies, but that they present a less favourable appearance from the unfortunate shareholders' point of view.

THE BATTLE O' THE BOTTOM-ROOMS.

(*Stiven v. The Heritors of Kirriemuir*, 1st Division, 13th November 1878.)

THERE was a parish had a kirk
 New biggit in the '93,
 And a' were rated for the work,
 Baith lairds o' high and laigh degree;
 But when they cam the space to square
 According to their rental-soums,
 A hunner feuars had nae mair
 Than nine-and-thirty bottom-rooms.

They couldna a' get in, 'twas clear,
 But what though some maun bide awa,
 They had the richt the Word to hear,
 And Scotsmen lo'e their richts 'bune a'.
 Time rolled along for gude and bad,
 Till space was found amang the toms
 For a' thae hunner men wha had
 But nine-and-thirty bottom-rooms.

Then rose a generation new,
 And ane, a birky chiel, appeared,
 Wha aye was adding feu to feu
 Until he thocht himsel' a laird.
 His canny neebors were content
 To delve their yairds and work their looms,

But Stiven said his valued rent
Should hae its share o' bottom-rooms.

At length the lairds a notion took
To paint the kirk and mak' it snod,
They thocht to gar it comelier look
And fitter for the praise o' God ;
And as the seats were unco ticht,
They swept them oot as wi' a broom,
That ilka kirk-frequenter micht
Hae mair commodious bottom-room.

The allocation syne began,
According to an auld decree,
But up and cried this angry man,
"Na, faith, nae auld decrees for me ;
I'd rather gang nae mair tae kirk,
And risk Auld Nick's eternal fumes,
Than yield to this unlawful work
O' conjunct rights in bottom-rooms.

"I've aye been wont to praise the Lord
Fornent yon pillar on the west,
And noo they've put a braw book-board
Just where my hurdies used to rest.
I canna worship wi' the heart,
Nor ponder on the day o' doom,
Unless my maist depending part
Is in its proper bottom-room."

The Lords replied, "What's that to us ?
Ye seem indeed a cankered chiel ;
The auld kirk stands, and while it does,
The auld decree maun stand as weel.
Then mak' the best o' that, and when
Ye chance to find a sitting toom,
Think mair upon your latter en'
And less upon your bottom-room."

Reviews.

A Concise Treatise on Private International Jurisprudence, based on the Decisions in the English Courts. By JOHN ALDERSON FOOTE, of Lincoln's Inn, Barrister-at-Law. London: Stevens & Haynes. 1878.

IN the preface to his well-known treatise on Private International

Law, Bar remarks that the works which have been published in modern times treating this branch of legal science may be divided into two classes. The first of these—chiefly of German origin—deals with the matter almost entirely on broad logical principles, neglecting to make any thorough examination into particulars. Little attention is paid to the early literature or to the numerous collections of legal decisions on the subject, the aim being rather to avoid an extensive use of authorities. A spirited but purely negative criticism has been, accordingly, in Bar's view, the chief result attained in this field. The second class—chiefly of French and English writers—combines with a thorough examination of details an extended use of authorities and the judgments of foreign Courts. But the failure in these works to agree upon fixed principles makes itself sensibly felt. The reader who may wish a guiding principle for concrete cases, is not sure whether the principle laid down at one place may not be at another either altogether receded from or essentially limited; and the feeling may readily arise that no general principles really exist, but that judgments proceed on unsettled grounds of equity. Bar claims for his work that it is an attempt to combine these two classes, "to combine a statement of the development of general principles with a close inquiry into details, as found in the decisions of Law Courts as well as in writers of authority home and foreign." "His aim," as he says, "was to produce a practically useful book, one which should give both to the judge and to the advocate in cases which might come before them a general view of the literature of the subject, a statement and criticism of individual opinions, and an enumeration of decisions which might be brought to bear in the way of analogy." Bar's whole preface is well worth reading, and it is a matter of regret that his work has not yet been translated into English.

We have thought the above remarks might not be out of place in noticing the publication of a new book on Private International Law. Very considerable uncertainty and misapprehension still exists in the minds of lawyers, especially in this country, as to the exact scientific position and bearings of this subject. The traditional authority of Story still confines English writers, and no attempt has been made at emancipation. Great work as the "Conflict of Law" undoubtedly is, we should like to know how many of the vague, ambiguous, and contradictory decisions in our Law Courts on questions of international law we owe to it.

The treatise now before us does not pretend to treat private international law at all systematically. Mr. Foote is content to belong to the second class of writers mentioned by Bar, or rather to a branch of them, his work being properly described as Private International Law, illustrated by decisions in the English Courts. Taking it, however, on this footing, Mr. Foote, in our opinion, presents a very clear and accurate statement of the subject. In a

preface he tells us that his aim has been to follow in the lines of Westlake's well-known treatise, and to supplement the deficiencies which lapse of time (now more than twenty years) has created in that work. In this he has been fully successful, and in several respects, we think, he has improved upon Westlake. His method of arrangement of the subject, for one thing, is more logical; Westlake's being based upon no principle or system which we can discover. Mr. Foote treats the subject under the four prominent divisions of Persons, Property, Acts, and Procedure, following to a considerable extent in his subdivisions the order of Justinian's Institutes. There are one or two points, however, on which the classification may be open to objection. Succession in immovables and movables, for instance, is with doubtful propriety discussed under separate subdivisions of the law of property, and marriage is made part of the law of status. At the same time we do not fail to observe that there are certain conveniences in such a classification, especially in enabling the peculiar position of our law in relation to succession in immovables—the *lex loci rei sitæ*—to be clearly brought out.

The recent decisions on points of international law (and there have been a large number since Westlake's publication) have been well stated. So far as we have observed, no case of any importance has been omitted, and the leading cases have been fully analyzed. The author does not hesitate to criticise the grounds of a decision when these appear to him to conflict with the proper rule of law. Most of his criticisms seem to us very just. We cannot, however, always agree with him. For instance, dealing (pp. 345-347) with the important case of *Cohen v. South-Eastern Railway Company* (L. R. 2 Exch. D. 253), which raised the question as to the local law applicable to contracts for carriage by land and sea, the view contended for is that different laws may govern the contract at different parts of the transit. Thus if there be a contract made in England to deliver goods in Germany with transit through France, and the goods are lost or damaged in France, the rule of law to be applied should be the French. We think this a wholly indefensible view. It cannot be supposed that the contracting parties at the inception of the contract could have intended or supposed a change in the character of their rights and liabilities at different periods in the course of its performance. We think it would be not only inconsistent with principle but inconvenient in practice to sanction such a rule. Whatever may be the meaning of the *dicta* of some of the Judges in *Cohen's* case, the judgment in the case of *Peninsular and Oriental Co. v. Shand* (3 Moo. P. C. N. S. 272) lays down the true rule, that the law of the place where the contract was entered into and its performance begun must govern. Bar also (sec. 66) argues for the same rule. Treating of marriage, Mr. Foote (pp. 54-57) makes some just observations upon the absurd position which our law forbidding marriage with

a deceased wife's sister puts us in relation to our colonies, where such marriage is with the sanction of our Legislature permitted. Private international law must declare in our Courts, if not that such colonial marriages are incestuous, at least that the offspring of them are illegitimate, and incapable of succeeding to property in this country.

On the whole we can recommend Mr. Foote's treatise as a useful addition to our text-books, and we expect it will rapidly find its way into the hands of practising lawyers. A somewhat novel plan has been adopted by the author of appending at the end of each chapter a summary in the form of a series of distinct propositions, such as might be adapted for a code. These propositions seem carefully and accurately drawn up, and they are at the end of the volume combined into a continuous summary.

Forms of Proceedings in Maritime Causes before the Sheriff Courts of Scotland. By ROBERT NEILL, Solicitor and Notary Public, Greenock. Edinburgh: T. & T. Clark.

IN this book, the contents of which show that Mr. Neill is well acquainted with the procedure of the Sheriff Courts in maritime cases, the local practitioner will find a series of carefully-drawn forms for his guidance in the different circumstances under which maritime disputes arise. The peculiarities and limits of Admiralty jurisdiction are pointed out, and the author adds useful advice as to the procedure to be adopted, while indicating the pitfalls that beset a pursuer's steps in this branch of the law. The author further gives brief *résumés* of important cases affecting maritime practice, the results of which he has fairly stated. We may, however, call attention to a somewhat misleading statement on page 103, where he says that in bottomry "bonds the master usually binds himself personally, but that if the amount of the bond will exhaust the proceeds of the ship and freight, thus defeating the master's claim for his wages, the English Courts give him priority over the claims of the bondholder." This is the very reverse of the law on the subject either here or in England, by which the master's claim is necessarily postponed to that on a bond to which he is a party, but there is an exception where the bond is over ship, freight, *and cargo*. In such a case, if the bond exhausts the ship and freight, but not the cargo, the Court will give the master priority, so as to allow him to claim out of the proceeds of the ship and freight, as the rule of law exists only for the protection of the bondholder, and need not be applied where his interests are secured. Mr. Neill, however, generally states the law with accuracy, and has been careful to refer to the leading cases on the different branches of his subject. The larger portion of the book is occupied with forms of petitions and specimen condescendences and pleas in law, which the practitioner in seaport

towns will do well to consult when about to raise a maritime action. The narratives are well expressed and full, but not too much so, except in the case of petitions for warrants to arrest *ad fundandam jurisdictionem*, in which cases a simpler and shorter narrative might with advantage be substituted. Such petitions are presented merely for the purpose of obtaining a warrant, and nothing more need be stated than is necessary for that purpose. A long narrative detailing all the facts, in the terms and at the length proper in the condescendence annexed to the petition in the action itself, is out of place and superfluous in such summary petitions. The forms of petitions given are, we think, likely to prove useful, and a valuable help to agents, who are often called to raise proceedings suddenly, and with little opportunity for careful consideration.

The Parliament House Book for 1878-79. Compiled by
W. BURNES, Printer, Edinburgh.

OUR copy of the Parliament House Book did not reach us for some time after its publication, which must be our excuse for not having noticed this excellent annual in our last number. The present issue is the fifty-fourth, and is a worthy successor to those which have previously appeared. It has commended itself so strongly to the profession that any words of praise which we can give it are almost superfluous. All the old matter, found so invaluable in time past, is still there, and several statutes of last session relating to Scotland have been added. One or two Acts, however, which we expected to find are not given, such as the Marriage Preliminaries (Scotland) Act, 1878, which is more worthy of a place than some others which have been inserted. The Digest of Practice in the Court of Session and the Tables of Fees and Stamp Duties form, as usual, important and useful features in the volume. A few slight slips certainly are still visible, and though these are unimportant, we may as well direct attention to those we have noticed in order that they may be corrected in a future issue. In point of practice we believe the calling of Motion Rolls before the Clerks at half-past nine has for many years been a thing of the past, if in fact the provisions of the Act of 1868 respecting such a procedure was ever put in force. We notice too that Mr. Clark of the Advocates' Library is still designated *Interim* Keeper, a mistake which we pointed out last year. One more very small slip and we have done; the hours in the Historical Department of the Register House are ten to three, and not ten to four, as given in the list of public offices in this volume.

It would be difficult to improve on this publication, but we may be allowed to suggest that a list of the members of the Bar and legal practitioners residing in Edinburgh would be a useful addition in future. Why adhere, too, to the old practice of classifying two-

thirds of the book under the title of "Appendix"? what is contained in it is quite as important as the matter in the other portions of the volume. We can only add what we have said so often before, that the Parliament House Book is indispensable to all members of the profession.

A Summary of the Law of Companies. By T. EUSTACE SMITH.
London: Stevens & Haynes. 1878.

THIS is a small production of some sixty pages, containing a sort of condensation of the Companies Acts of 1862 and 1867, divided into four chapters, and illustrated by reference to exactly seventeen cases. It is a book avowedly for the purposes of "cram," and as such may possibly be found useful by some who cannot be at the trouble to get up the subject by any more satisfactory method. Otherwise the book is perfectly valueless.

Legal Periodicals of the Year.

WE take this opportunity, as usual, of acknowledging a few of the various legal periodicals which have been sent us during the year. The *Law Magazine and Review* in its four quarterly publications has kept up that reputation which it has justly earned. It has very much improved in the character and ability of its papers within the last few years. In the present volume we may note those on "Law and Custom among the Southern Slavs," "Criminal Procedure in Scotland; its Lessons for England" (which we noticed at the time, p. 546), "Parish Registers," "Collisions at Sea; a Scheme of International Tribunals," as being of special interest. Our esteemed contributor, Sheriff Barclay, is responsible, we observe, for a digest of select Scottish cases in each number, a very praiseworthy feature, and one peculiar to the magazine in question. The obituary of lawyers is exceedingly full and complete, and the reviews of books carefully and intelligently written.

The *Solicitors' Journal* has always something of interest to attract attention, and must be a valuable repertory of information to all English legal practitioners. The *Irish Law Times*, though small in size, is excellently edited, and its matter is always of first-rate quality. In American journalism the *Albany Law Herald* is perhaps the ablest and most enterprising of the weekly legal periodicals. Its original articles show that the philosophy as well as the practice of law is by no means neglected on the other side of the Atlantic, while its reports are copious and well selected. The *Southern Law Review* is a capably printed and energetically edited quarterly. The *New Zealand Jurist* is as fearless in its criticism of the Colonial Bench as usual, but its reports and articles are both varied and interesting.

The *Revue de Droit International*, as we had occasion previously

to notice,¹ loses the services of its able editor, M. Rolin-Jacquemyns, but we have no doubt that under M. Alphonse Rivier it will continue to keep up to the high standard which it has already attained. *La Science Politique* is a new monthly publication, issued in Paris; its aims and objects may be best understood from the following sentence from the preface: "Les mythes auxquels nous en voulons particulièrement sont ceux qui, sous le nom de Providence et d'Etat, ont engendré le plus de maux pour les espèces humaines."

We are compelled at present from want of space to notice more particularly many journals which we have received.

Obituary.

JAMES MACKNIGHT, Esq., W.S.—We have to announce the death of the above-named gentleman, which took place last month at the age of sixty-eight. He was the son of the Rev. Dr. Thomas Macknight, of the old Parish Church of St. Giles, Edinburgh, and was admitted a member of the Society of Writers to the Signet in 1833. In 1845 he was elected one of the Police Commissioners, and in 1856 he was returned to the Town Council for St. Bernard's Ward, and continued to sit in that body down to his death. It is chiefly in connection with municipal matters that his name has been before the public, but there was no one in the Council whose opinions and conduct commanded more respect than did Mr. Macknight's. Amongst the other appointments which the deceased gentleman held was that of clerk to the Prison Board, an office to which he was appointed in 1874, but which was abolished when the prisons were taken over by Government under the Act of last year. Mr. Macknight was also clerk to Water of Leith Sewerage Commission and secretary to the Ecclesiastical Commissioners. In social and domestic intercourse he was very popular, possessing as he did a rich fund of dry humour and a large stock of anecdotes. He will be much missed by a large circle of friends, to whom he had endeared himself by the straightforwardness of his disposition and geniality of his manner.

JAMES CUNNINGHAM, Esq., W.S.—The death of this gentleman is announced at the age of seventy-eight. He was admitted a member of the Society of Writers to the Signet in 1823, and was a J.P. for the city of Edinburgh. "Mr. Cunningham was a warm supporter of various movements in the city for promoting the social and religious welfare of the community, and was held in the highest esteem by all who came in contact with him."

ALEXANDER FALCONAR, Esq.—We have this month to chronicle the death of one who, though not the oldest acting Sheriff-Substitute in Scotland, had held that office for a longer term of years than any other. Born in 1803, Mr. Falconar was appointed Sheriff-Substitute of Nairn on the 16th May 1823, by Sir George Abercromby of Birkenbog, who was then Sheriff Principal, so that he filled the office for more than half a century. He had indeed a hereditary connection with the county, as his father and maternal grandfather had both been Sheriff-Substitutes in previous years. The late Sheriff enjoyed the respect of the county both as a judge and as a private gentleman, and his loss will be much felt by all with whom he came in contact.

The Month.

Application of the City of Glasgow Bank Directors for Liberation on Bail—Sir George Mackenzie's opinion that Bankers by such Frauds commit Theft.—The issue of this application has not unnaturally been viewed by the public with great interest, and it says much for the elasticity of our Scottish criminal system that it has been found equal to the occasion. Lord Young was the only Judge who was in favour of forcing the public prosecutor to accept bail, and the ground of his holding this view was that the *species facti* alleged could not possibly be held to be theft. The other Judges would not prejudice the question, but held that there were probable grounds for the Sheriff having committed for theft, and that being so, they would not interfere at present. It may be useful, as aiding the discussion to which this result is sure to give rise, to direct attention to the views of that very eminent criminal lawyer, Sir George Mackenzie. Under the title "Theft," in his Criminal Law, published in 1699, he was almost prophetic as regards the present case: "I remember to have read of a banquier at Paris who was flea'd and then quartered for having borrowed vast sums upon design to break with it (which instance I have set down for the merchants of our times), and seeing the lender is as much wronged, and the seeker of the loane shews as great fraud by this pretence as in OTHER theft, I see not why the punishment should not be the same." As the Act under which the privilege of bail is accorded was passed in 1701 (chapter vi.), this contemporaneous exposition of what was a theft, *then* punishable with death, and *still* unbailable, is most valuable. Lord Young himself seems so lately as 1st March 1876 to have been of the same opinion, for in the petition of Matthew and Carolina Sproull for bail (3 Couper, 232), his Lordship not only joined the Lord Justice-Clerk and Lord Ardmillan in refusing bail, but said, "My only doubt was whether, in dealing with the present petition for bail, we can take that for a committal on the arger charge of theft, *which is not bailable*, while reset is."

Retirement of Lord Justice Christian.—This learned Judge, whose decisions have always commanded respect, though the methods which he adopted to give utterance to his opinions, and the way in which he sometimes, to put it mildly, “spoke his mind,” have not unfrequently attracted attention, has sent in his resignation as a member of the Irish Bench. The *Irish Law Times* gives the following sketch of the career of the Lord Justice:—

“Jonathan Christian, the son of a respectable solicitor of Carrick-on-Suir, was called to the Bar in Hilary Term, 1834, and joined the Leinster Circuit. In 1846 he took silk, and five years later was advanced to the dignity of the coif. He was admitted a Benchler of the King’s Inns in 1852, and in 1856 was appointed Solicitor-General under Lord Palmerston’s first administration. In 1857, on the death of Mr. Justice Burton, he was appointed a puisne judge of the Court of Common Pleas; and in 1867, under the administration of Lord Derby, he was elevated to the office of Lord Justice of Appeal, and in the same year he became a member of the Privy Council. At the Bar he had attached himself exclusively to the Courts of Equity at a time when they boasted such advocates as Edward Pennefather, Francis Blackburne, Richard B. Warren, William Brooke, and a little later, Richard W. Greene, Richard Moore, Abraham Brewster, and, though last, emphatically not least, Francis Fitzgerald; at a time when the doctrines of that equity law which, as he himself has observed, ‘is common law developed, ameliorated, enlarged, civilized,’ were expounded by such judges as Sugden, Blackburne, Plunket, Sir Michael O’Loghlen, and T. B. C. Smith. He had had experience of its practice both before and after the reforms of 1850 and 1867, and he has witnessed the working of that of 1877. Nor was the Lord Justice a merely passive spectator of the great legal changes of his day. He was himself an advocate of law reform. He has himself, in one of his extra-judicial addresses, recalled the fact that he had been, from the first, a declared enemy of the cause petition system; nor did he shrink from expressing his opinion of it from his place at the bar of the Court of Chancery, believing as he did that the true remedy for the evils of that system could alone be found in some such measure as that which became law in 1867; and to his zealous surveillance that great measure unquestionably owes, to a considerable extent, its due and effectual administration. The progress of the Judicature Bill in Parliament had also in him a watchful and active critic, and by published letters, by pamphlets, and even by addresses from the Bench, he impressively expounded his convictions as to what was mainly needful in such a measure. Nor has he ever shrunk from avowing an adverse estimate of the merits of actual legislation. Indeed, the vehemence of his expressions in this respect exposed him on more than one occasion to censure in Parliament. His denunciation of the Land Act, 1870, in the case of the *Marquis of Waterford’s Estate* (5 Ir. L. T. Rep. 125), nearly led to an address to the Crown for his removal from the Bench; and one of his published letters, in reference to the revival of a second Landed Estates Court judgeship, was also brought under the notice of Government in March 1876, and was severely commented on by the Premier. His opinions, certainly, on many questions of a political or public nature were extremely strong, and, unfortunately, he never hesitated to declare them in language too undisciplined, and on occasions which, to say the least of it, were unsuitable. His prolonged feuds with Lord O’Hagan, Vice-Chancellor Chatterton, and with the official law reporters, led to extra-judicial harangues of an unusual and unseemly character; and his remarks on one of those occasions, in the case of *King v. Anderson*, last year, caused the proposal of a vote of censure by a considerable section of the Bar. And yet, while himself so aggressive, the Lord Justice was peculiarly sensitive to the remarks of others. An observation made by the late Chief Justice Whiteside, at a public banquet, led to a sarcastic retort,

fulminated by the Lord Justice even from the judgment-seat; and but recently he appeared to hold (like Lord Kenyon on one occasion) that it was almost a personal affront for a learned colleague to express dissent from an opinion advanced by the Lord Justice; while even the House of Lords did not escape his lash, when, in *O'Rourke v. Bolingbroke*, his judgment had been somewhat severely treated.

"But, be this as it may, the recorded judgments delivered by Lord Justice Christian will ever command the highest respect of the profession—a respect likely to increase yet more in future years. Whether conversant with the principles of equity or common law, they were ever distinguished by exhaustive research, profound erudition, and perspicuous instruction; they were pronounced with logical precision, incisiveness, and force; they were guided by inflexible impartiality and independence. Nor can we fail to join in the sentiment of regret expressed by the Lord Chancellor on Monday last, that, while those 'judgments remain for the instruction of the profession,' the Court of Appeal has been deprived of 'the assistance which the great learning and ability of this most distinguished Judge has so long contributed to the administration of justice in this country.' He had witnessed the foundation of the Court of Appeal in Chancery, he had seen its dissolution; and now, when our newly constituted appellate tribunal so greatly needs all the judicial strength it could possibly command, the great lawyer who might have proved its best mainstay has retired. He has retired, but not from any wish to shrink from duties which, on the contrary, his desire to serve the public renders him still willing to perform; it is because of the increased difficulty, from imperfection

hearing which he has for some time experienced in following the arguments of counsel. He has retired, but that master-mind may yet be devoted to the public service. The retirement of a Kent gave us his famous Commentaries. That of Lord Justice Christian may yet give our country cause for further pride. Yes—we repeat, as we said when he hinted, in 1873, that he was about to withdraw from judicial life—into that retirement we are fain to follow him with the hope that the sense of duty, by which he has been sustained upon the difficult path which it has been his lot professionally to tread, will prompt him to the discharge of those responsibilities of which one so gifted cannot permanently divest himself—whether presented in the garb of law reform, or of the solution of those moral or economic problems which agitate the mind of this restless age; and we trust it will be impossible for one who so scorned 'laborious ease' in the meridian of his days, to become in the evening of life a mere spectator of the progress of his professional brethren, or of his country, to which, and not to himself, the gifts of men like the Lord Justice primarily belong."

Glasgow Winter Circuit.—The Christmas Circuit in Glasgow will open this year on Monday, 23rd December, at twelve o'clock. Lords YOUNG and CRAIGHILL. JOHN BURNET, Esq., Advocate Depute. Mr. MACBEAN, Clerk.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF PEEBLESSHIRE.

Sheriffs NAPIER and ORPHOOT.

HYSLOP v. HYSLOP.

Husband and Wife.—An application of a singular kind, illustrating a branch of the law of husband and wife that has not been before the Supreme

Court for consideration since the year 1820, has lately been under the consideration of the Sheriffs of Peebles. The question raised was as to the right of a husband who has resolved that his wife shall occupy a house other than that in which he himself is resident, and has provided for her one that is suitable to her quality, to apply to the Sheriff for a warrant to carry his right into effect by removing her from his house, and an interdict against her return.

The pursuer in the action, which was raised on 12th October 1878, was John Hyslop, station-master at the Caledonian Railway Station at Peebles, and the prayer of his petition asked the Sheriff "to ordain the defender," i.e. his wife, "to remove from the dwelling-house and pertinents occupied by the pursuer at the Caledonian Railway Station at Peebles; and further to interdict and prohibit the defender from returning to the foreshaid dwelling-house and pertinents, and to grant warrant accordingly."

In the condescendence annexed to his petition the pursuer, after narrating his marriage, stated: "The pursuer has for sundry good causes resolved that his wife shall remove from the dwelling-house and pertinents presently occupied by him at Peebles to Roseneath Cottage, Lockerbie Road, Dumfries, which cottage he has provided and furnished for her, and which is suitable in all respects to her position in life. The pursuer has offered to provide aliment to the defender at the rate of ten shillings per week; and he is willing to find caution for the due and punctual payment thereof, he in addition paying the rent of said cottage and all taxes and rates leviable in respect of the occupancy thereof. He has desired and required the defender to remove to the cottage provided for her, as above mentioned, and has offered and is willing to pay her travelling expenses; but she refuses to remove thereto. It has therefore become necessary, in order to avoid any breach of the peace, to make this application to the Court."

Upon this statement of fact, and the condescendence contained no more, he pleaded: "1. The pursuer, as his wife's curator, having right to fix her place of residence, is entitled to decree of removing as craved. 2. The pursuer, on providing and furnishing for the defender a suitable residence and aliment as condescended on, is entitled to decree as craved."

On 15th October the Sheriff-Substitute (Orphoot) granted warrant to cite the defender; thereafter, on 26th October, after hearing the pursuer's procurator, the defender having made no appearance either personally or by a procurator, he dismissed the action, adding this note:—

"*Note*.—When the application was first presented to the Sheriff-Substitute, the doubts which he then entertained regarding the competency of the action led him to hear the pursuer's procurator upon that point before granting warrant to cite. At that hearing the Sheriff-Substitute was referred to the case of *Webster or M'Intyre v. M'Intyre* (30th June 1820, not reported, Hume's *Sess. Papers*, Summer 1820, No. 26, MSS. Notes on the *Papers*, also quoted in Fraser on 'Husband and Wife,' second edition, vol. ii. p. 872), and it was said that in that case a warrant similar to that prayed for here was granted by the Sheriff, and a suspension thereof was refused by the Court. Not then having access to Hume's *Sess. Papers*, and the text in Fraser not being inconsistent with such statement of the result of that case, the Sheriff-Substitute granted warrant to cite. Having since examined the Session *Papers* in Webster's case, the Sheriff-Substitute has found that no warrant such as that now prayed for was there granted. The case of Colquhoun below noticed was also cited, but the remedy there sought was different from the one here required. No other case was referred to in support of the application, and therefore the first circumstance to be kept in view in considering the present case is, that to grant the warrant craved would be a proceeding without precedent.

"The pursuer desires by the judgment of the Court to have his wife ordered to remove from his house, and if necessary to have her forcibly removed therefrom by officers of Court. The latter step, it was explained at the Bar, was what was meant by the prayer 'to grant warrant accordingly.' It is obvious that such a prayer, if competent at all, is one to be granted only

upon the clearest grounds. In support of his application the pursuer alleges that 'for sundry good causes,' which may mean because he desires it, he has resolved that his wife shall remove to a suitable house where he will adequately support her; that she refuses so to remove, and that 'in order to avoid any breach of the peace' the present application is necessary. Before dealing with the relevancy of these averments, it is necessary first to consider the question, 'Is this application competent?' The Sheriff-Substitute is of opinion that it is not.

"There is no doubt that a husband, on furnishing her with a suitable residence and with aliment, can require his wife to live apart from him (*Colquhoun v. Idmir*; M. App. *voce* Husband and Wife, No. 5, 1804). He can even put her out of his house if he chooses (*Fraser on 'Husband and Wife,'* second edition, vol. ii. p. 869, and authorities there cited). But it by no means follows that he is entitled to ask a Court to do that for him. It is thought to be very clear that he cannot make such an application to a Court merely because he desires his wife to leave him, and because he *anticipates* that she will commit a breach of the peace if he attempts to remove her himself. As it is the husband's right to fix his wife's residence, it is her duty to obey his order to remove; but is that a duty which the law will enforce by personal execution? The Sheriff-Substitute thinks it is not. Is the wife to be charged to remove, and then imprisoned for not doing so? If that course be adopted, when should she be liberated? Upon her own promise to remove, or upon caution which no one is authorized to require? If upon her own promise, what if she break it and return to the petitioner; could she be reimprisoned, and if not, what is his remedy? The alternative of removal by officers of Court will be afterwards considered, but so far these appear to be formidable difficulties. Suppose the parties to be separated and one of them got decree of adherence against the other, that decree would not be enforced by personal execution. The law will not enforce specific performance of the duty of adherence. But if it will not compel married persons to cohabit—to fulfil one of the chief purposes of marriage—why should it interfere actually to separate them, to violate that purpose? Even under a decree of separation and aliment, if a husband intruded upon his wife, her remedy would not be in virtue of the decree to have him removed from her house by officers of Court. These considerations appear to make the competency of the application, to say the least of it, exceedingly doubtful. It is a minor branch of the same point, but even were application otherwise competent, the competency of it in the Sheriff Court appears to be very questionable.

"Apart, however, from the general objections to seeking the remedy here craved, the Sheriff-Substitute thinks that to the application as framed there are insuperable objections. A warrant is required to authorize officers of Court to remove the defender from the pursuer's house. This was explained to me, by force if necessary. That, as has already been stated, is a warrant which has never yet been granted by a Civil Court in this country, and it is a warrant which would or might produce a breach of the peace, to avoid which the application is presented. Would such breach of the peace, if committed by the defender resisting the officer who removed her, also amount to deforcement, then where is the defender to be removed to? It may be inferred that to the cottage at Dumfries is meant, but that is not prayed for. A warrant in terms of the prayer would be executed by removing the defender to the middle of the road opposite the pursuer's door, and there leaving her.

"Again, interdict is asked to restrain the defender from returning to the pursuer's house. Suppose this to be granted and obeyed. The defender could bring her action of adherence, and, as no misconduct is alleged against her, it may be assumed in argument that she would obtain decree of adherence to be followed in due time by divorce. So that the pursuer, because he had exercised a legal right, fortified by *ex hypothesi* a valid judgment of a competent Court, might be divorced. Again, how long is the interdict to last? during the pursuer's pleasure it is presumed. And what would constitute a breach of

interdict? a return on the part of the defender, possibly to entreat the pursuer to receive her. That which might in certain contingencies be a most proper course for the defender to adopt, would be a contempt of Court punishable by imprisonment. On the whole matter, and without minutely considering the relevancy of the averments, the Sheriff-Substitute is satisfied that the application is incompetent and must be refused. J. H. O."

The pursuer having appealed to the Sheriff (G. Napier), he ordered a reclaiming petition. In that petition the pursuer founded upon the case of *Webster v. McIntyre* referred to by the Sheriff-Substitute, and as the analysis of the case was pronounced by the Sheriff to be correct, it may be well, the case itself being unreported, and not accessible therefore without some trouble, to quote that part of the petition referring to it:—

"That the husband does possess the right to regulate the place of his wife's residence does not appear to be doubtful; that has been solemnly decided in the case of *Colquhoun v. Colquhoun*, M. App. voce Husband and Wife, No. 5, March 7, 1804, a decision that has been referred to in subsequent cases as undoubted law; *Ringer v. Ringer*, Jan. 15, 1840, 2 D. 307, Lord Moncreiff's opn. p. 324; *Webster v. McIntyre*, referred to below, and also in More's Notes to Stair, i. 4. 9, and Fraser on Husband and Wife, ii. p. 869. It is important to notice that the rubric of that case bears that 'a husband having required his wife to leave his house without assigning any reason, the Court refused to interpose by an interdict to keep her in possession.' The ground upon which the majority of the Judges base the conclusion at which they arrive is the right of the husband to exercise undivided control over his house and family. 'His reasons for discontinuing his present connection may be amply satisfactory to his own mind. But these he would willingly conceal from the world, and from himself if he could, unless he be driven to a disagreeable investigation in support of his suspicions, and a still more painful disclosure of his own and his wife's dishonour.' It is plain, from the reasoning of the majority of the Judges, that the right is one that does not require any proof or even allegation of misconduct on the wife's part to give rise to it; it is a right accruing to the husband as head of the family, and it is thought that this case establishes at least this much, that if he choose to exercise the right, no court of law can interfere to keep the wife in possession, even although there be not the slightest suspicion of infidelity or misconduct against her. But the remedy asked in the present case is, as remarked by the Sheriff-Substitute, of a somewhat different character. The husband is the party who comes into Court here, and asks warrant to put into execution the right of removal which it is submitted he undoubtedly possesses. This application is said by the Sheriff-Substitute to be unprecedented; and in the case of *Webster v. McIntyre* (June 30, 1820, Hume Sess. Papers, Summer 1820, No. 26), referred to at the discussion, he observes that no such warrant as is here craved was granted. It is submitted that although there is not any record that such a warrant was granted, yet the interlocutors pronounced by the Sheriffs and Lord Ordinary, and affirmed by the Court, take it for granted that the next step in the procedure must be to grant such a warrant, and if not in terms, yet by necessary implication, justify the competency of the present application. In that case a husband, who was living apart from his wife, applied to the Sheriff for a summary warrant to remove her from a house that had descended to her as her father's only child, in which she had taken up her residence. He supported his application by pleading that the *jus mariti* gave him a right to the possession of this house, and his position as husband a right to regulate the place of his wife's residence. The Sheriff-Substitute affirmed these rights by the findings of his interlocutor, ordained possession to be given to the husband, and appointed a state of the subjects to be lodged, that he might fix a suitable aliment for the wife. This interlocutor was affirmed on appeal by the Sheriff-Depute. The Lord Ordinary (Lord Cringletie), on appeal to the Court of Session, in respect of the amount of aliment offered by the husband, remitted 'to the Sheriff to proceed in the cause, and to see the said aliment secured to

the complainer before decerning in the removing.' Thereby, it is submitted, plainly implying that so soon as the aliment was secured, the Sheriff must necessarily proceed to grant warrant for the removal of the wife. In his note his Lordship adds: 'The Lord Ordinary thought it more decorous that Mr. M'Intyre should apply to the Sheriff for obtaining possession than that he should take it by his own authority, which the Lord Ordinary thinks Mr. M'Intyre was entitled to do; and the Sheriff, considering that, since the husband claimed the warrant of the law, he was entitled to withhold it unless he saw the lady suitably provided, declined to interfere until he saw a proper alimentary provision settled on her. . . . If' the Lord Ordinary 'had remitted to the Sheriff to dismiss the process, he sees no law that could prevent Mr. M'Intyre from taking possession of the house in which his wife lives, and doing therein what he chooses; and he thinks this better than to leave Mr. M'Intyre to take the law into his own hand.' A reclaiming petition against this interlocutor, wherein the wife urged that it was an entirely anomalous procedure for a court of law to interfere in domestic quarrels, and that there never had been an instance of a husband prevailing upon a court of justice to send its officers to turn a wife out of doors, was refused. It is thought that the course of procedure narrated is a complete precedent for the present application: the process was in that case sent back to the Sheriff to see the aliment secured, and then, as seems to be a necessary inference from the terms of Lord Cringletie's judgment, he was to order removal by a summary warrant. In the present case the pursuer offers to find caution for the punctual payment of what is, for a person in his rank of life, an ample alimentary provision, and to secure a house suitable for her residence; that being secured, does it not necessarily follow that warrant should be granted as here craved?"

It was also urged that a court of law would always assist a party to vindicate an undoubted right, and that the jurisdiction of the Sheriff was large enough to deal with this case, the question really being of the same nature as an application for summary removal of some intruder upon lands who has no title of possession to show. To say that the order for removal would lay the foundation of an action for adherence, to be followed by a divorce, was no good answer to the application, for the Judges that decided the case of Colquhoun contemplated distinctly that that was the necessary result of such an exercise of the husband's power, and yet affirmed that his power was undoubted.

The Sheriff pronounced the following interlocutor:—

"*Edinburgh, 7th November 1878.*—The Sheriff having considered the pursuer's appeal, together with reclaiming petition and whole process, recalls the interlocutor appealed against; and, in respect that the defender has not entered appearance, grants the prayer of the petition, and decerns, but subject to the condition of the pursuer, before extract, finding caution, to the satisfaction of the Sheriff-Clerk, for the due implement of the offers made by him in that petition.

"G. NAPIER.

"*Note.*—In the interlocutor appealed against the Sheriff-Substitute has dismissed the action in general terms, but I infer from his note that it was as being 'incompetent' that he dismissed it. It appears to me, however, that the Sheriff-Substitute having, as stated in his note, specially heard the pursuer's procurator on the question of competency before granting warrant to cite, and having, after such hearing, granted, without reservation of any kind, a warrant for citation in the statutory form, under the statutory certification in the case of the defender not only entering appearance, and the *inducia* having expired without such appearance being entered, and a motion then made by the pursuer for decree in terms of the prayer of the petition, the Sheriff-Substitute was not entitled to refuse that motion, and dismiss the action as incompetent or otherwise; and under section 14 of the recent Sheriff Court (Scotland) Act, 1876, and the imperative word 'shall' there used, had then no alternative but to 'grant decree in absence in common form in terms of the prayer of the petition,' subject only to the caution, there offered by the pursuer, being found

either before decree or before extract. If such decree had been so granted, of course there would have been no appeal by the pursuer, and whatever my own opinion might be, I could not have interfered; so that if my own opinion had been against the competency, there might be room for question whether I was now entitled to act upon it, or do more than recall the Sheriff-Substitute's interlocutor, and instruct him to pronounce one in conformity with the above-mentioned section 14. My own opinion, however, is very decided in favour of the competency of the petition on the authorities referred to in Fraser on 'Husband and Wife,' 2nd ed. vol. ii. pp. 869-872; and with regard to the unreported case of *Webster or M'Intyre v. M'Intyre*, 30th June 1820, there mentioned as appearing from Baron Hume's Session Papers, and what the Sheriff-Substitute states as the result of his examination of these papers, that he 'has found that no warrant such as prayed for was there granted.' I too have examined these papers, which consist simply of a reclaiming petition by the wife (Mrs. M'Intyre) against an Inner House interlocutor adhering to the interlocutor of Lord Cringletie, Ordinary, in what she herself describes as an advocacy of a summary removing against her before the Sheriff, at the instance of her husband, from a house to which she had recently succeeded through the death of her father intestate, and the only writing thereon is the word 'refuse,' and the date '30th June 1820,' known or presumed to be in the handwriting of Baron Hume. But although it appears to be true, as admitted by the present pursuer in his own reclaiming petition, that there is no record (and indeed the proceedings had not at that date gone the length) of such a warrant being granted, I quite concur in his observation there made (p. 6), that the interlocutor pronounced by the Sheriff and Lord Ordinary, as affirmed by the Court, take for granted that the next step in the procedure must be to grant such a warrant, or one similar in principle to what is now craved. I concur also, generally, in the narrative which the pursuer gives of the proceedings in that case, as appearing from Mrs. M'Intyre's above-mentioned reclaiming petition, and in the inference to be drawn from them as implying the undoubted recognition of the competency of such an application as the present. Indeed, Lord Cringletie, in a note to his interlocutor affirmed by the Court, after remarking that 'he' (the husband) 'could take her' (his wife) 'by the shoulders and turn her out,' proceeds to say that 'the Lord Ordinary thought it more decorous that Mr. M'Intyre should apply to the Sheriff' rather than take the law into his own hands, and that this also gave the advantage to the wife, of the Sheriff, when thus applied to by the husband, being entitled to see that proper provision was secured to her before granting the warrant of the law. Such also are my views as regards the present case, and I consider it unnecessary, especially in an undefended case, to go into a discussion upon any of the ulterior speculations or hypothetical questions adverted to by the Sheriff-Substitute in his note as possible to result from the granting the prayer of the petition, as I have done, subject to the offered caution being found before extract. G. N."

'I' the execution of this judgment the defender offered no opposition, and quietly left her husband's house. The law applicable to the case was not, therefore, subjected to the consideration of the Supreme Court. The arguments *hinc inde* in cases of the kind, which fortunately are not of very frequent occurrence, are fully and clearly raised in the discussion of the case in the Sheriff Court. The question is certainly an interesting one, and raises many considerations of great difficulty. An exposition of the law on the subject by the Court of Session would have been highly instructive: whether the Court at the present day have carried the law of the cases of Colquhoun and Webster, in a defended action, to the length of summarily removing the wife from her husband's house, and interdicting her from returning thereto, is perhaps doubtful. The authority of the present case is considerably reduced by the fact that the judgment was an *ex parte* judgment, and that the learned Sheriffs differed in opinion. It may, at all events, serve as a record of the earlier case of Webster, which is not reported in the Books.

SHERIFF COURT OF LANARKSHIRE.

Sheriff LEES.

CUMMING v. DUNCAN.

Sheriff Court Act of 1876, sec. 14—Reponing.—The pursuer of this action sought delivery of a deposit receipt for £100, or, failing its delivery, for decree for the contents. The defender did not enter appearance, and, having been held as confessed, was ordained to deliver the receipt within two days. She did not do so, and decree was then pronounced against her for £100. Within seven days of the second decree she applied to be reponed under subsection 1 of section 14 of the recent Sheriff Court Act.

The Sheriff pronounced the following interlocutor :—

Glasgow, 8th August 1878.—Having heard parties' procurators on the motion for the defender, No. 2 of process, finds that the motion as framed is incompetent, refuses it, and appoints the consigned money to be repaid to the defender. J. M. LEES.

Note.—From the statement submitted on behalf of the defender it is plain that her case is one in which reponing ought to be allowed, but it must be granted in proper form. She has applied under the first subsection of the 14th section of the Act of 1876, and the question is, Is it competent for her to apply now under that section? It appears to me she cannot.

"Under that subsection, where a decree has passed in absence, the defender may within seven days consign £2, lodge his defences, and move to be reponed. If the application is duly made the motion must be granted. The statute directs that 'when this motion is made the Sheriff shall pronounce an interlocutor recalling the decree in absence,' etc. But it apparently contemplated that such a motion may be made unduly, and therefore refused; for it goes on to prescribe that 'until the motion for the recall of the decree in absence has been disposed of, the decree shall not be extracted,' implying that in some cases the decree in absence may be extracted as soon as the motion to be reponed is disposed of, and of course it can only be extracted if the decree is refused. The words of the preceding clause justify the same inference.

"The second subsection allows the application to be reponed to be made at any time, even after the decree is extracted, but the procedure is somewhat different. (1) The defender must show cause; he must present a written explanation, supported by any documentary evidence he can in support of it; (2) he must consign the sum of £5, not £2; (3) the decree may, not must, be recalled; (4) it can only be recalled so far as not implemented; (5) the Sheriff may pronounce such order as is expedient and suitable to the circumstances, and not merely repon or refuse to repon; (6) the pursuer may get much more of his expenses paid than under the first subsection.

"It is thus clear that where the defender has allowed the seven days of grace to pass unused, the Legislature intend quite a different and much more stringent course of procedure to be followed.

"In this action the pursuer asks for delivery of an interest receipt, or failing its delivery, then for payment of the sum of £100, with interest. The defender failed to enter a notice of appearance, and accordingly, as no defences were stated for her, she was on 8th July held as confessed, and ordained within two days after intimation of the judgment to deliver the receipt to the pursuer; in other words, she was held confessed that she had it and without right. She failed to give it up, and on 17th July decree issued for £100, interest, and expenses. On 24th July she has applied to be reponed under the first subsection, and has consigned £2, and lodged her defences. The pursuer opposes this application as made under the wrong subsection.

"The interlocutor she asks to be reponed against is that of 17th July; but supposing I reponed her against it, unless I recalled the decree of 8th July,

her position would be no better, for I would then have of new to appoint her within two days to deliver the receipt to the pursuer, and my interlocutor would under subsection 4 be final and not subject to review. What she wishes to be reponed against is the interlocutor of 8th July, and if it is recalled, all subsequent interlocutors as based on it would fall and have to be recalled. Now, I can well understand that where a person had some article of another's, he might prefer to return it rather than pay the fancy value put on it; and in such a case I should not hesitate to recall the interlocutor enforcing the alternative conclusion. But that is not what the defender wishes here.

"It is urged for her that the two interlocutors are to be read together, and that the seven days run from the last one. This is a specious argument, but it will not bear scrutiny.

"Every Sheriff-Substitute almost is familiar with cases which involve a great deal of procedure before the final decree can be given—*e.g.* diligence in security, acquisition of property under a Municipal Act, procedure for interdict or renovation under the Public Health Act, enforcement of the mutual obligations of landlord and tenant, and the like. Is it to be said that a person called as defender could demand to be reponed at any time within seven days of the final interlocutor. Take, for example, an application to find that a subject is dangerous, or is injurious to the pursuer, and for warrant to have it put right at the defender's expense. He enters no appearance. A remit is made to a person of skill to report. His report is made. Warrant to have the necessary structural alterations is granted. They are made. The accounts are rendered, approved of, and decree for their amount, with expenses, pronounced. Within seven days the defender lodges his defences, pleading no title to sue, all parties not called, error in the instance, no jurisdiction, bar by personal exception, etc., consigns £2, and demands to be reponed. Can it be contended that that is what the statute meant. It seems to me that the statute meant the defender to be foreclosed from all such defences. At each step I have mentioned he could appear without being reponed, *e.g.* to criticise the accounts, object to the sufficiency of the report, and so on. But so far as his defences on the merits are concerned, these, I apprehend, can be entertained only if he be reponed under the second subsection. Take it, again, that a landlord has brought a sequestration in security and for payment. Within seven days after the decree for the final quarter's rent the tenant demands to be reponed. On the argument urged for the present defender, the tenant could not be refused, and all the interlocutors must fall, and yet seven of them may have been implemented. Surely it is plain that the application must be made under the second subsection, that so the Sheriff may under the wider powers there given him do what is just.

"Indeed, the argument is self-destructive; for if a defender can lie by and claim to be reponed within seven days of the final interlocutor, it would follow that if he appeared at the time of pronouncing the interlocutor no reponing would be necessary against any earlier interlocutors.

"In truth, it is very manifest that what the first subsection of the statute contemplated was reponing a defender against his failure to lodge defences, for it directs that the defences are to be allowed to be received, while the second subsection covers, under its breadth of procedure, such a case as the present.

"J. M. L."

The judgment was acquiesced in.

Act.—Macdonald.—Alt.—Frame.

SHERIFF COURT OF PERTSHIRE.

Sheriff BARCLAY.

APPEAL IN M'KENZIE'S SEQUESTERED ESTATE.—June 1878.

Sequestered estate—Ranking—Provisions of marriage contract.—A widow to whom an annuity was provided by antenuptial contract had her annuit

valued, and claimed a ranking on her husband's sequestrated estate for the ascertained value. The trustee admitted the claim, but only under deduction of the value of the household furniture taken possession by her under a clause in the marriage contract. The widow appealed against the deduction, and the following judgment was pronounced :—

" Having heard parties' procurators, and made avizandum with the procedure and debate: Finds—*First*, That the appellant, Mrs. Alice Hope or M'Kenzie, is the widow of William M'Kenzie, the bankrupt, who died on the 16th day of April 1877. *Second*, By antenuptial contract between the parties on the 8th and 9th July 1860 the appellant was provided with an annuity on survivorship; and, further, it was set forth that the said William M'Kenzie 'thereby provided, assigned, conveyed, and made over to and in favour of the said Alice Hope, in the event of her surviving him, the whole household furniture and plenishing, bed and table linen, wines, books, pictures, and trinkets that might be belonging to him at the time of his death, to be used and disposed of by her (the appellant) as her own absolute property.' *Third*, The spouses occupied the farmhouse of Unthank during the existence of the marriage, and the household furniture and plenishing, the property of the husband, were situated in said house, and were there at the time of his death. *Fourth*, The appellant removed from Unthank to Dundee in August 1877, and at same time removed the furniture and plenishing to her house there. *Fifth*, The estates of the deceased were sequestrated on 23rd October 1877, the first deliverance bearing date 25th September that year. *Sixth*, The appellant claimed to be ranked for the ascertained value of her annuity, which the respondent, as trustee, has agreed to admit and rank, subject, however, to the deduction of the value of the said furniture and plenishing of which she had obtained possession. In law finds that the conveyance of the furniture and plenishing, never having been legally completed before the sequestration of the estates of the deceased, cannot, in a question with creditors, give the appellant any right to the same, and therefore the trustee has done right in so far compensating the ranking of the value of the annuity with the value of the furniture and plenishing. With this finding in law continues the case that the parties may adjust the details of the ranking, so that a final judgment on the appeal may be given.

" HUGH BARCLAY.

" *Note*.—The law appears fixed by a long series of decided cases: 13th June 1848, *Campbell v. Stewart*, 20 Jurist, 468; 25th December 1851, *Darling*, 24 Jurist, 139; 20th December 1850, *Brown v. Fleming*, 23 Jurist, 176. The appellant cited 27th July 1763, *Fell v. Jameson*, Morison, 2853. But this was a special case as to the effect of an assignation to a *third party*, not intimated until after bankruptcy, and the Court reserved the question of the interest of the creditors challenging the assignation. The appellant's solicitor also cited *Young v. Loudoun*, 17 D. 998, 26th June 1855. In that case the property of the furniture was never in the husband, but was a gift by an aunt to the wife, excluding her husband's *jus mariti*."

Act.—*Whyte*.—*Alt*.—*Mitchell*,

The decision was acquiesced in, and parties adjusted their claims and ranking by joint minute.

SMALL DEBT SHERIFF COURT OF PERTH.

Sheriff BARCLAY.

WEBB v. M'FEAT.

Damage—Custody of animals.—The facts of this case are fully set forth in the following interlocutor :—

" *Perth*, 25th October 1878.—The claim is for £1, being loss and damage sustained by the pursuer in consequence of a cat belonging to the defender having killed a carrier-pigeon belonging to the pursuer in the neighbourhood

of his premises on or about the 18th of August last, whereby he has lost at least the sum claimed, and for which the defender is responsible in respect of the natural disposition or propensity of cats to kill birds, and the defender's failure to keep the animal properly enclosed or secured. The defender denied that the pursuer's carrier-pigeon was killed by the defender's cat. Many witnesses were examined on the ownership of the culprit cat. Though the residences of the parties seem to be surrounded by a colony of cats, the Sheriff was satisfied that the defender's cat was the true offender. But the relevancy of the claim was ably contended on both sides. There is no precise authority on the point. The pursuer has suffered a *loss*, but the defender has made no *gain* in consequence, and therefore the principle of equity which forbids one to make profit by another's loss has no place here, neither can the claim be sustained on mere ownership. There must be some *culpa*. Many accidents, some even fatal, arise from property, but there must be some evidence of *culpa* on the part of the proprietor to render him liable for the consequences. It was quite legitimate for the pursuer to keep a pigeon, but just as much so for the defender to keep a cat. The latter is more a domestic animal than the pursuer's bird. But there are no obligations on the owner of a cat to restrain it to the house. The pursuer's plea is that the natural instinct of the feline race is to prey upon birds as well as mice. So it was argued that the owner of a cat should prevent the *possibility* of its coming into contact with its favourite sport. But it is equally true that the owner of a bird should exercise similar caution to prevent its coming within the range of a hostile race. If the defender's cat had trespassed into the pursuer's house or aviary where the bird was secured, there might be ground to find the owner of the cat liable for the consequences of its being at large. With parity of reason had the bird intruded itself on the territory of the cat and there been slain, there could have been no recourse, because the owner of the bird should have prevented its escape. In the present case it appears that both the quadruped and the winged animal were in trespass. Both were on neutral territory, being a green of a neighbouring proprietor. It was the duty of the pursuer to take the guardianship of his bird said to be so valuable, and therefore both owners are in equal blame, and the case must be viewed as arising from natural law, for which neither owner without *culpa* can be answerable. The defender having at first not sympathized with the loss of the pursuer, but rather put him at defiance, and forced him to prove that it was the defender's cat who slew his bird, the defender will be assoltized, but without costs. H. B."

Act.—Mitchell.—Alt.—Dow.

SHERIFF COURT OF FIFE.

Sheriff CRICHTON.

HOMER RIGG v. EDIE.

Objection to charges made by a procurator who held a commission as a Sheriff Clerk-Depute sustained.—In this case the defender was found liable in expenses subject to modification. He objected to the whole charges in the pursuer's account of expenses, except outlays, in respect that the pursuer's procurator was a Sheriff Clerk-Depute. Sheriff Crichton sustained the objection, and pronounced the following interlocutor:—

"*Edinburgh, 15th November 1878.*—The Sheriff having heard parties' procurators, and considered the note of objections for the defender, No. 21 of process, together with the answers thereto, No. 22 of process. In respect the pursuer's procurator held during the period from 13th November 1877 to 8th August 1878 a commission as Depute Sheriff Clerk of the county of Fife, and as such was not entitled directly or indirectly to act as a procurator before the Sheriff Court of the said county: Sustains the said objections to the extent of £21, 15s. 6d., being the charges in said account other than outlays, *quoad ultra*

repels the said objections and approves of the report by the auditor : Finds that, after deduction of the said sum, the pursuer's account, including the fees paid to reporters, amounts to £22, 3s. 4d. : Finds that the sum of £22, 3s. 4d. is, in terms of the interlocutor of 29th July 1878, subject to modification, modifies the said sum to £11, 3s. 4d., and decerns against the defender for payment to the pursuer of the said sum of £11, 3s. 4d.

“JAMES ARTHUR CRICHTON.

“*Note.*—The defender objected to all the charges, except outlays in the pursuer's account of expenses, on the ground that the pursuer's procurator, Mr. Osborne, held a commission as Sheriff Clerk-Depute for the county of Fife. It was admitted that on 7th December 1877, which was previous to the date of raising this action, the Sheriff Clerk granted a commission in favour of Mr. Osborne to be one of his Sheriff Clerk-Deputes for the county of Fife. This commission was not withdrawn until the 28th October 1878. It was stated by the pursuer that Mr. Osborne had by virtue of this commission signed one or two minor writs presented to him when the Sheriff Clerk and his ordinary Depute were absent at Perth Circuit in September 1877, but that he had not in any way acted as Sheriff Clerk-Depute in connection with the present case, nor since that time. The Sheriff sees no reason to doubt this statement.

“It was argued that as Mr. Osborne's appointment was only an honorary one, the Act of Sederunt of 1783, and the authorities referred to in the note of objections, were not applicable. Looking to the terms of the Act of Sederunt, and the opinions of the Court with reference thereto in the authorities quoted, the Sheriff feels constrained to give effect to the defender's objection.

“The Sheriff has also made a considerable modification on the pursuer's account, because he thinks that the large amount of expenses connected with the reports was mainly caused by the inaccuracy of Mr. Landale's plan, No. 7 of process, produced and founded on by the pursuer. J. A. C.”

DUNDEE SHERIFF DEBTS RECOVERY COURT.

Sheriffs CHEYNE and HERIOT.

CHALMERS AND DEWAR v. HENDERSON.

Debts Recovery Act, sec. 2—Competency.—This was a complaint under the Debts Recovery Act, concluding for £13, 9s. 9d., as per an account prefixed. The account gave details of goods furnished by pursuers to defender to the amount of £51, 12s. 9d., and the sum sued for was brought out by crediting the defender with a contra account of £38, 3s.

The defender stating that his contra account was largely understated, and that on an adjustment of accounts the balance was in his favour, pleaded that the action was incompetent under the Debts Recovery Act.

Sheriff Cheyne on 6th November 1878 sustained the plea of incompetency and dismissed the action, adding the following:—

“*Note.*—I have come to think that the objection which the defender takes to the competency, and which is not only an important but also, so far as I have been able to discover, a novel one, is well founded. The question to be determined simply is, What is the value of the debt at issue in this action? Is it the sum concluded for, being the balance after crediting a contra account, or is it the amount of the pursuers' accounts irrespective of the contra account? Now, had the furnishings been disputed (and in dealing with the question of competency it can make no difference that they are not disputed), what the pursuers would have required to prove would have been that they had supplied the defender with goods to the value of £51, 12s. 9d. It therefore seems to me that, although I am asked to give a decree for only £13, 9s. 9d., the difference being extinguished by the contra account, ‘the debt’ which forms the subject of this action is really and truly the sum of £51, 12s. 9d., and if

that is so, it follows of course that the defender's objection must be sustained. The case of *Inglis v. Smith* (1859, 21 D. 822), upon which the defender founded strongly, though not precisely in point, goes, I think, a considerable way to support the view which I have taken, and which, I may add to prevent possible misconception, does not impugn the competency of suing under the Debts Recovery Act for a debt originally of larger amount than £50, but reduced either by payments or by restriction to that or a less sum."

This judgment was appealed to the Sheriff (Heriot), who on 16th November adhered to it, stating in a note that, looking to the opinions of the Judges in the cases of *Inglis v. Smith*, and *Steven & Co. v. Grant* (17th October 1877, 5 R. 19), there seemed to him to be no room for doubt on the point raised.

Notes of English, American, and Colonial Cases.

RAILWAY COMPANY.—Additional works—Special Act—Deviation—Deposited plans—Height of bridge over public road.—By their special Act, passed in 1872, a railway company whose line was made in 1857, were authorized to divert a road crossing their line on the level, and to carry it under their line by a bridge, and the soil of the diverted road was to belong to the company. The new road and bridge were to be in accordance with the deposited plans and sections, which showed a total height from the road to the rails on the bridge of 16 feet 3 inches, but did not mention the height of the headway. The special Act incorporated the Land Clauses Act, 1845, and the Railway Clauses Act, 1845 (section 49 of which provides that all bridges shall have a headway of fifteen feet), and it provided that nothing in the special Act should exempt the company from the provisions of the general Acts. It also gave the company power to deviate from the deposited sections to the extent of five feet. The company without altering the levels of their line (no such alteration being shown on the deposited plans) made their bridge of the prescribed height of 16 feet 3 inches, but with a headway of only fourteen feet, and that partly gained by carrying the road below the level of the adjoining land, so that at times it was flooded from an open ditch near the line and became impassable. The evidence showed that if the surface of the road was raised one or two feet, all serious inconvenience from flooding would be removed, and that a headway of twelve or thirteen feet would be sufficient for the traffic of the district. On an information at the relation of the road surveyors,—*Held*, that the Attorney-General was entitled to an injunction restraining the company from making or maintaining the bridge with less headway than fifteen feet, or any bridge which, by reason of the road thereunder being of too low a level, might cause the road to be flooded.—*Attorney-General v. The Furness Railway Company*, 47 L. J. Rep. Chanc. 776.

VOLUNTARY WINDING-UP.—Set-off by contributories.—In the winding-up of a limited company the rule which prevents contributories from setting off debts due to them from the company against the amount due from them for calls, applies equally whether the winding-up be compulsory or voluntary.—Observations on *The Brighton Arcade Company v. Dowling*. *Re Whitehouse & Co.*, 47 L. J. Rep. Chanc. 801. The question of set-off under the Winding-up Acts considered.—*Ibid*.

CROWN GRANT.—Ownership of minerals.—The appellant was the grantee, on perpetual quit-rent, of land in Griqualand under a grant made prior to the resumption of sovereignty by Great Britain. The grant was made "subject to all conditions and regulations as are already or may in future be fixed referring to land granted on the same conditions:—"*Held*, that the minerals were the property of the appellant, subject to the rules and regulations imposed by the Ordinance and Proclamation of 1871. *Webb v. Giddy*, 47 L. J. Rep. P. C. 71.

GENERAL INDEX.

- ADEMPTION**, 63.
Advocates' Widows' Fund, 152
Amateur Legislation on the Rights and Wrongs of Married Women, 266
American Law Reports, 355
Animals, Liability of adjoining Proprietors for Injury done by, 471
Appeals, Scottish, in House of Lords, Correspondence as to, 608
Argyle, Stair and, 118
Bachelor's Dream, The, 155
Bank, Case of the Royal British, 584
Bar of England and Ireland, Admission to the, 547
Bar, The Russian, 548
Bar, Scottish, Professor Lorimer on the, 436
Bar, On the supposed Decline in the Character and Prospects of the Scottish, 337
Bills of Exchange Act, The, 1878, 351
Bottom-Rooms, The Battle o' the, 651
Building Restrictions, 535
Bye-laws of Railway Companies, 381
Chantrelle Case, The, 287
Christian, Lord Justice, 668
Comfort v. Litigation, 40
Commission of Sheriff-Substitute, New Form of, 320
Communio Bonorum in Sweden, 595
Court of Session, The, and the Government, 430
Crime in Edinburgh, State of, 152
Criminal Codes, 353
Criminal Law, English and Scottish, 546
Criminal Law Evidence Amendment Bill, 154; **Report of Committee of Faculty of Advocates on**, 211
Dean of Faculty, The New, 98.
Delirium Tremens, Responsibility in, 518
Depute Clerk of Court, Appointment of, 603
Education for the Service of the State in Continental Countries, Notes on—Russia, 297; **Germany**, 344; **Holland**, 626
Education (Scotland) Act, 1872, On recent Cases under the, 18, 631
Entails, Equity in, 10
Equity in Entails, 10
Fraser on Husband and Wife, 281
Germany, Notes on Education for the Service of the State in, 344
Glasgow Magistrates, The, and their Procurator Fiscal, 99
Government, The, and the Court of Session, 430
"Heathen Chinee," The, and Naturalization, 380
Hierarchy, Roman Catholic, and the Statutes of 1560, 225
Holland, Notes on Education for the Service of the State in, 626
Husband and Wife, Fraser on, 281
Identity, Remarkable Case of Mistaken, 31
Illiterate Justice, An, 100
Implied Entry, 119
International Jurisdiction, 178, 292, 358, 403
International Law, Institute of, 549; **Prolegomena to a Reasoned System of**, 561
Irish Law Reports, The, 38
Judge and Jury, 41
Jurisprudence, The Science and Art of, 1, 169
Læconic Judgment, A, 40
Law Agents' Act, Examinations under, 610
Law Clerks' Institute, 437
Law Fellowship in Edinburgh University, 151
Law, The Majesty of the, 489
Law of Nations, Association for Reform, etc., of, 543
Law Reports—The Irish, 38; **American**, 355
Legal Maxims, The Press on, 40
Liabilities of Masters and Servants, On certain Principles affecting the, see Masters
Liability of Trustees, 617
Licensing Courts, The, 638
Liquidation, A costly, 101
Liquidators and Shareholders in Court, 641
Lord Clerk-Register (Scotland) Bill, The, 819; **Report of Committee of Faculty of Advocates on**, 372
Lorimer, Professor, on the Scottish Bar, 436
Lunacy Acts, The, 249
Majesty of the Law, The, 489
Marriage, The New Law of Regular, 449
Marriage Preliminaries (Scotland) Bill,

1878, Report of Committee of Faculty of Advocates on, 204
 Married Women, Amateur Legislation on the Rights and Wrongs of, 263
 Masters and Servants, On certain Principles affecting the Liabilities of, 75, 129, 186, 244, 303, 409, 460, 512
 Mistaken Identity, Remarkable Case of, 31
 Nairn, Katherine, Trial of, for Murder, 232
 Names, 529
 Notes in the Inner House, 196, 413, 466, 527
 Official, A Hard-worked, 548
 Ogilvie, Patrick, Trial of, for Murder, 232
 Partnership, 588
 Prison Congress, 549
 Prisons, Discontinuance of certain, 215
 Prisons (Scotland) Act, 1877, The, 57, 123
 Procurator Fiscal, A, what he was, is, and will be, 24, 69
 Proof before Answer, 600
 Proprietors, Liability of adjoining for Injury to or by Animals, 471
 Public Prosecutors and Superintendents of Police, 207
 Railway Cases, On two recent, 454, 522
 Railway Companies—Liability of, as Carriers of Passengers' Luggage, 141; The By-laws of, 381
 Responsibility in *Delirium Tremens*, 518
 Restrictions, Building, 535
 Road Legislation, 505
 Rolin-Jacquemyns, M., 435
 Roman Catholic Hierarchy and the Statutes of 1560, 225
 Royal British Bank Case, The, 584

Russia, Notes on Education for the Service of the State in, 297
 Science and Art of Jurisprudence, The, 1, 159
 Scotland, Statutes affecting, 1878, 593
 Scottish Bar, On the supposed Decline in the Character and Prospects of the, 337
 Serfdom in Scotland, 393
 Shareholders and Liquidators in Court, 641
 Sheriff-Commissary and Justice of Peace Courts for 1876, Statistics of, 28
 Sheriffs and Sheriffs-Substitute, 214
 Sheriff-Substitute, New Form of Commission of, 320
 Shireen, William, Public Dinner to, 485
 Solicitors' Supreme Courts, Reports by, on Bills, 317
 Stair and Argyle, A forgotten Passage in the Life of Lord Stair, 113
 Statutes affecting Scotland, 1878, 593
 Succession to Personal and Heritable Estate, On the Taxation imposed on the, 574
 Sweden, *Communio Bonorum* in, 596
 Taxation on Succession, 574
 Territorial Waters Jurisdiction Bill, The, 256
 Theft, is it bailable? 659
 Title to Sue, On the, 14
 Trade Domicile, 403. *See* International Jurisdiction
 Trustees, Liability of, 617
 Tutor-at-law, Appointment of, in a Sheriff Court, 321
 University of Edinburgh, Law Fellowship in, 151

OBITUARY.

Anderson, James T., Advocate, 97
 Berry, John, Advocate, 37
 Blair, Hugh, W.S., 97
 Burn, George, W.S., 543
 Burnett, Arthur, 149
 Cowan, Lord, 484
 Cunningham, James, W.S., 658.
 Dickson, James D., Advocate, 543, 607
 Drysdale, William, D.C.S., 317
 Falconar, Alex., 669
 Gibson-Craig, Right Hon. Sir William, Bart., Advocate, 198
 Grant, Robert, Advocate, 608
 Horn, Robert, Dean of Faculty, 93

Hozier, James, Advocate, 98
 Laing, David, LL.D., 606
 Lees, Thomas, Solicitor, 97
 Lidderdale, W., Solicitor, 375
 Lockhart, Allan Elliot, Advocate, 203
 Macdonald-Hume, M. N., W.S., 429
 Macknight, James, W.S., 658
 Morison, A. Kelly, S.S.C., 375
 Murray, J. C., W.S., 98
 Sinclair, G. L., W.S., 608
 Stewart, Charles, Solicitor, 149
 Thomson, George, Advocate, 98
 Wilson, Thomas, W.S., 375

REVIEWS.

Agriculture, Decisions in Cases connected with, in Court of Session, 1800-1878 (Anderson), 604
 Bell's Treatise on the Law of Arbitration (Kirkpatrick), 35
 Companies, Summary of the Law of, 657

County Records, The Preservation of (Hector), 479
 Criminal Procedure in England and Scotland (Eliot), 148
 Digest of Cases decided in Court of Session, 1867-1877, 427

- Election Law, Digest of Cases relating to, 371
 Fiare Prices (Hector), 479
 Glasgow, Report upon Statistics of, for 1877 (Watson), 423
 International Law, Elements of (Wheaton), 202
 Jury Lists in Scottish Counties (Hector), 479
 Law and Legislation, The, of the past Year (Hallard), 605
 Law of Nations, Report of the Association for Reform, etc., of, 372
 Legal Periodicals, 1878, 657
 Maritime Causes, Forms of Proceedings in (Neill), 655
 Medical Jurisprudence, Lectures on (Ogston), 265
 Method of Law, The (Monahan), 373
 Parliament-House Book, 1878-1879, 656
 Poor Law, etc., A Digest of the (Smith), 313
 Practice of the Court of Session, The (Mackay), vol. I., 87
 Private International Jurisprudence, A Treatise on (Foote), 652
 Roman Law, A Compendium of (Campbell), 145
 Savings Banks, Law relating to (Forbes), 36
 Selections from the Judicial Records of Renfrewshire (Hector), 315
 Styles of Deeds and Instruments (Hendry and Mowbray), 423

INDEX TO SUBJECTS OF SHERIFF COURT CASES.

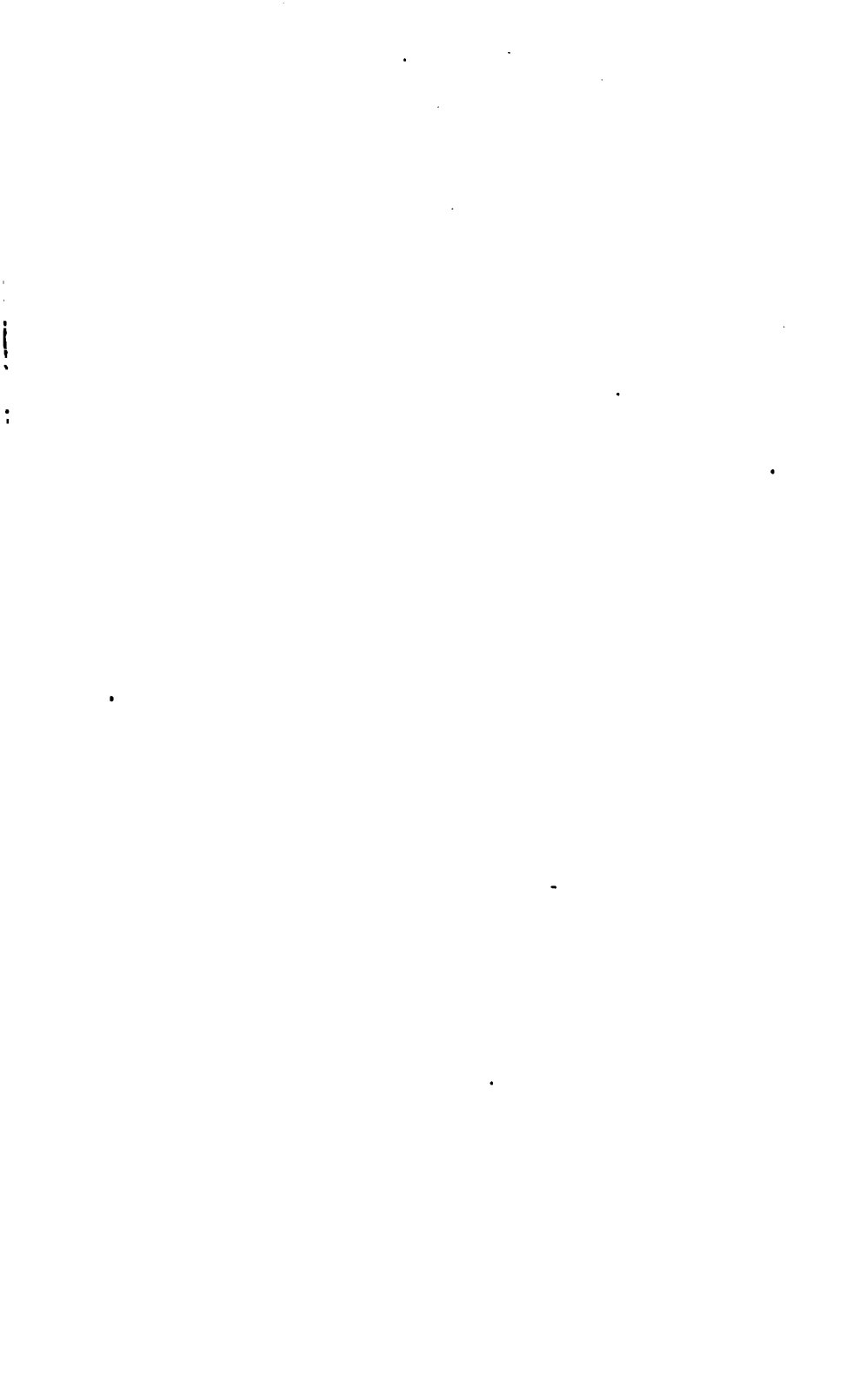
- Adventure, Joint, Liability of Partners in, 327
- Aliment, Quantum of, regulated by Classes, 448
- Bankruptcy—Election of Trustee on Sequestrated Estate, 45; Act 1596, c. 5, illegal Preference under, 107; Petition for Liberation in, 273; Law Agent's Account not preferable Claim on Estate, 274; Act of Grace, 614
- Bill of Lading, Stipulations in, 613
- Carrier—Liability of, for Goods consigned by Through-Contract, 218; Delivery by, 222
- Cassio, Petition for—Omission of Creditors' Names from, 158; Form of, 325; Jurisdiction in, 614
- Charter-Party, 276
- Competing Title to pledged Property, 612
- Contract, Breach of, 386
- Contract, Implied, 278
- Count and Reckoning by next of Kin, 159
- Cruelty to Animals, 611
- Custody of Child, Contract as to, 386
- Damages, Liability of Landlord of House for, caused by fall of plaster, 383; by animals, 669
- Debts, English, Law of Imprisonment in Scotland on, 273
- Debts Recovery (Scotland) Act, 1867, Jurisdiction under the, 50; competency, 671
- Dismissal of Servant for Disobedience, 610
- Education (Scotland) Act, 1872, sec. 70, Failure to provide Elementary Education under, 161
- Evidence, Pursuer's, alone not sufficient to establish Paternity in case of Aliment for an Illegitimate, 271
- Executor, Appointment of, Father's title in preference to Brothers of the deceased, 445
- Expenses, Refusal of Sheriff-Substitute to decern for, 217
- Farm, Question as to, being a Trade, 225
- General Police Act, sec. 225, Provisions of as to what constitutes a Trade, 497
- Hire, Liability for Water Rates of Persons keeping Horses for, 497
- Husband and Wife, 661
- Jurisdiction of Sheriffs-Substitute where Counties have been united, 614
- Lease, Joint, Liability of Lessees under, 327
- Libel, Newspaper, 41
- Locomotive Act, 1861, Question under as to Wheels of Traction-Engine, 322
- Master and Servant, 491, 495, 610
- Merchant Shipping Act, 1854, sec. 319, Penalty under the, 101
- Negligence, Gross, 441
- Negotiorum gestor*, Liability of, acting gratuitously, 441
- Pawnbrokers Act, 1862, 612
- Pledged Property, Competing Title to, 612
- Poacher, Assault on, and Deprivation of Gun of, 443
- Poor Law Act, sec. 71, Relief under the, 157
- Principal and Agent, 549
- Prison Act, 1877, Question under, as to Jurisdiction, 614
- Private Prosecutor, 498
- Railway Clauses Consolidation (Scotland) Act, 8 and 9 Vict. c. 33, sec. 60, Question under as to Fencing, 49
- Record, Amendment of, under Sheriff Courts Act, 1876, 41
- Reparation, 49, 491
- Salvage, not "lawful service and employment" of a Tug, 276
- Sequestration, Ranking in, 669
- Sheriff Clerk-Depute, right to practise as Procurator, 670
- Sheriff Courts Act, 1853, Question under sec. 15, 46
- Sheriff Courts Act, 1876—Amendment of Record under, 41; Summary Procedure under, 46; Question under sec. 43, 46; Abolitions of Forms of Process by, 325; sec. 23, Time between Proof and Debate, 328; Reponing under sec. 14, 667
- Sheriff, Right of, to grant Warrant to break open Doors, 492
- Sheriff-Substitute, Jurisdiction of, where Counties have been united, 614
- Trespass Act, Day, 443
- Use and Wont, Plea of, in Contravention of Statute, repelled, 101
- Warrant to give Possession of House let under Verbal Lease, 492
- Warranty, Judge of Roup not competent to decide question as to, 276
- Water Rates, Liability of certain Persons for, 497
- Wild Fowl Preservation Act, 498

INDEX TO NAMES OF SHERIFF COURT CASES.

- | | |
|---|--|
| <p> A. B. v. His Creditors, 278
 A. v. B., 386, 443, 448, 610
 Alder & Sons v. Bremner, 276
 Barnetson (Begg's Executor) v. M'Beath, 275
 Bell & Son v. Macbeth, 50
 Caithness Road Trustees v. Lyon, 322
 Chalmers & Dewar v. Henderson, 671
 Clouston v. Clouston, 46
 Commissioners of Old Aberdeen v. Anderson & Mackie, 497
 Cottrell's Sequestration, 459
 Cumming v. Duncan, 667
 Dewar v. Thomson & Farquharson, 612
 Gordon Duff v. G. N. of S. Railway Co., 49
 Gray v. Gray's Executor, 159
 Harbison v. Robb, 383
 Harrold v. Miller, 158
 Home Rigg v. Edie, 670
 Hyslop v. Hyslop, 661
 Inspector of Poor of Parish of Denny v. Do. of Govan, 157
 King v. Reid, 496
 Laurenson v. Hay, 271 </p> | <p> Macdonald v. Port Dundas Sugar Refining Co., 107
 Macfarlane v. Phillips, 41
 M'Laughlin v. Potter & Co., 222
 M'Kenzie's Sequestration, 668
 Manson v. M'Pherson, 278
 Manson v. Sinclair, 439
 Millat v. Marshall, 492
 Munro, Petitioner, 325
 Nicolsons v. Thomson, 216
 Noble's Sequestration, 45
 Procurator Fiscal v. Captain of Clydesdale, 101
 Russell v. Walker & others, 326
 School Board of Forghen v. David Smith, 161
 Seaton v. Chalmers, 491
 Sellar, Petitioner, 614
 Spences v. Leisk & Walker, 46
 Tait & Son v. Addison, 613
 Todd v. Hay, 498
 Tulloch's Executor v. Marwick, 328
 Webb v. M'Feat, 669
 Webster v. Shiress, 445
 Woods v. Burns, 218 </p> |
|---|--|

INDEX TO MATTERS OF ENGLISH, AMERICAN, AND COLONIAL CASES.

- Adulteration of Seeds Act, Sulphur-smoking, 501
- Alehouse, Transfer of licence, 560
- Auctioneer, Liability of, to purchaser for non-delivery, 53
- Bankrupts' Property Contract, 556
- Bill of Exchange—Re-exchange, 222 ; insolvency of acceptor, 500 ; acceptance in writing, 502
- Bill of Lading, 501, contract implied by, 501
- Carrier—"Paintings," 336 ; liability of, for passengers' luggage, 389
- Carriers of animals, Liability of, 162
- Charitable legacy, Legal and illegal objects of, 168
- Charity, "poorest of my kindred," *Cyprés*, 558
- Charter-party—Construction, 559 ; warranty of class, 616
- Company—Promoter of, commission, 280 ; prospectus of, 388 ; directors *ultra vires*, 503 ; voting at meetings of, 504 ; payment of advertisements by shares, 558
- Compulsory Pilotage—Negligence, 224 ; continuation of employment, 559
- Contagious Diseases (Animals) Act, 166
- Contract, fraud, 560
- Contributory to company, contract with promoter, 391
- Copyright, Registration of, 223
- Crown grant, 672
- Debtor and creditor, 55
- Defamation, privilege-jurisdiction, 390
- Dissolution of marriage, 55 ; domicile, 389
- Domicile, *animus manendi*, 502
- Donatio mortis causa*, 55
- Dramatic copyright, Infringement of, 559
- Election by beneficiaries, 55
- Elementary Education—Formation of School Board, personation of voter at preliminary meeting, 616
- Embezzlement, wild rabbits, 223
- Evidence—Deposition of witness too ill to appear, 503
- Extradition—Trial of extradited criminals for offences not named in treaty, 330
- Foreign Government—Cannot be sued in England, 54
- Gaming—When money recoverable, 55
- Harbours, etc., Clauses Act—Damage to pier, act of God, 390
- Husband and Wife—Separation, authority to pledge husband's credit, 559
- Insurance against fire, Contribution to, 54
- Intoxicating liquors—Licence, 500
- Jurisdiction, Service of petition out of, 555
- Justice of the Peace—*Bona fide* belief of authority, 503
- Landlord and tenant, 54, 111, 223
- Land tax, Exemption of site of hospital from, 502
- Lease—Uncertainty, 555 ; breach of covenant, 558
- Letters of credit, Contract created by, 167
- Libel, Responsibility of proprietors of newspapers for, 166
- Licence, Keeping a dog without, fraction of a day, 388
- Licensing Acts, 54
- Lights on fishing-smack not attached to nets, 223
- Marine Insurance—Liability of underwriter, 56 ; policy, 555
- Marriage, nullity of, 554
- Mine—Right to work, 56 ; liability to fence, 224 ; injury by, 502
- Mines Regulation—Owner's responsibility for breach of rules, 504
- Negligence—In employment of railway company, 54 ; liability of landlord for, 111 ; of telegraph company, 166 ; in compulsory pilotage, 224 ; of carrier, 389 ; evidence of, 390 ; injury to cattle by, 501 ; of innkeeper, 560
- Parliament—Amendment of list of voters, 168
- Partnership—Reputed ownership, 556 ; renewal of lease by partner, 556 ; breach of covenant, 557
- Party Wall—Common law rights, Metropolitan Building Act, 557
- Patent—Infringement of, 111 ; insufficient specification, 112 ; prior publication, 391
- Poor Law—Derivative, parentage, 504 ; settlement of illegitimate pauper, 560
- Property—In ice in unnavigable stream, 550
- Public Health Act—Paving, etc., expenses, 504 ; dismissal of clerk to local board, 555
- Railway and Canal Traffic Act—Liability of company for damage, 387
- Railway Company—Bye-law, travelling without ticket, 388 ; undue preference, 392 ; height of bridge, 672
- Revenue—Inhabited house duty, income tax, 166, 279 ; succession duty, 223
- Sailing rules, 280
- Sale of Food and Drugs Act, 500
- Shipping—General average, 167 ; jurisdiction of Wreck Commissioner, 389 ; charter-party, etc., 500 ; breach of contract of delivery, demurrage, 557 ; non-delivery of cargo, 558
- Solicitor and Client—Property in letters, 112 ; bill of costs, taxation, 560
- Statute, Repeal if special, on general words, 556
- Stoppage in *transitu*, 112
- Trade-mark—Misrepresentation of, 389 ; exclusive use of, 502
- Trade name of colliery, 502
- Vendor and Purchaser—Contract by letters, 112 ; condition, 390 ; evidence of payments by instalments, 503 ; inaccurate statement, 503
- Winding up—Unlimited company, 224
- voluntary and judicial, 555 ; rent, 556 ; set-off by contributories, 672
- Will—Accidental omission in, supplied, 167 ; error in names, 224 ; ademption of legacy, 388





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